

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved On: 17th September, 2010*
Judgment Delivered On: 20th September, 2010

+ **W.P.(C) No.19560/2004**

THE SECRETARY (EDUCATION) Petitioner
Through: Ms.Latika Chaudhary, Ms.Simran,
Mr.Nitesh Kumar Singh, Advocates for Ms.
Avnish Ahlawat, Adv.

versus

SH. PURAN SINGH KHATKAR & ANR. Respondents
Through: Mr.A.K.Trivedi, Advocate for R-1.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE MOOL CHAND GARG

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

MOOL CHAND GARG, J.

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1. At the outset it may be noted that the first respondent i.e. the contesting respondent is the sole holder of the post of Assistant Social Educational Officer (for short 'ASEO') and has superannuated from service on 31.10.2002. With his superannuation no other person holds the said post as the cadre in which the post existed is a dying cadre. The financial impact of the decision passed by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as 'the Tribunal') in favour of respondent No.1 is a little less than ₹60,000/- for the entire duration which would be covered by the decision of the Tribunal. The pay which the respondent would be entitled to would be ₹6500-10500 as against ₹5500-9000 granted by the petitioner.

2. The petitioner has filed the aforementioned writ petition aggrieved

of the order dated 28.10.1997 passed by the Tribunal whereby the Original Application filed by the respondent being O.A.No.1690/2003 claiming replacement scale of the pay scale of ₹5500-9000 to ₹6500-10500 has been allowed. While allowing the O.A., the Tribunal has observed as under:

“17. In the result, for the aforesaid reasons, we partly allow this OA and direct the respondents to reconsider the claim of the applicant for grant of pay scale of ₹6500-10500 from 01.01.1996 till 30.12.2002, the applicant shall be entitled as a consequent arrears of pay and also revision of retiral dues. The process should be completed within a period of three months from the date of receipt of a copy of this order. There shall be no order as to costs.”

3. We may now pen down some relevant facts to understand the background of this litigation. The respondent was appointed as Technical Assistant in Social Welfare Department of Delhi Administration. Thereafter, he was promoted as Project Officer on 01.02.1995 and finally he was further promoted as Assistant Social Education Officer w.e.f. 28.11.1989. The respondent retired as such w.e.f. 31.10.2002. On 29.06.1972 a Presidential order was passed whereby issue revising the pay scale of left over categories other than teachers which included the post of ASEO was considered and it was decided that pay scale of that post be fixed in a higher grade as mentioned in the Annexure to the said Presidential order which meant that the pay scale would be admissible to PGTs, would also be available to ASEOs. On that basis the pay scale of ASEO was accordingly fixed that is to say parity was maintained with respect to the pay scale of ASEO also which continued till the recommendations made by the Fourth Pay Commission also. However, after the recommendations were given by the 5th Pay Commission the pay scale of PGT which was fixed at ₹ 6500-10500, the said pay scale was not made admissible to the ASEOs. Accordingly, O.A.No.2598/2001 was filed by the respondent claiming parity in the pay scale of the post of ASEO to that of PGT in the Directorate of Education which was disposed of by the Tribunal vide

order dated 10.05.2002 whereby directions were given to the Government of India as well as the Govt. of NCT of Delhi to consider the matter. The relevant portion of the order reads as under:

“7. Having regard to the reasons recorded and discussion made above, we quash and set aside the order dated 28.10.1997 (Annexure-A-9) qua the post of ASEO and direct respondents to re-consider the claims of applicant for equation of his post and pay scale with that of PGT w.e.f. 01.01.1996. In the event of an adverse decision to revise the scale of pay of the post of ASEO as available to PTG, i.e., ₹6500-10500, respondents shall obtain Presidential orders as the post of PGT since 1967 as per the decision of the President. Respondents are directed to complete the above exercise within a period of three months from the date of communication of these orders.

8. The OA is partly allowed as above. No costs.”

4. The Government of India after examining the matter decided that it was not feasible to extend the higher pay scale of ₹6500-10500 to the respondent at par with the post of PGT as the post of ASEO on which post the respondent had been working was not a teaching post.

5. The order passed by the petitioner in having rejected the case of the respondents for equalizing the pay scale with that of PGT dated 30.12.2002 reads as under:

No.F.15-20/2002-UT-1

Govt. of India

Ministry of Human Resource Development
Department of Sec. Education & Higher Education
B-Wing, Ground Floor, Shastri Bhawan
New Delhi, Dated 30th December, 2002

To,
The Rajender Kumar,
Director of Education,
Directorate of Education,
Govt. of NCT of Delhi,
Sham Nath Marg,
Old Secretariat, Delhi-110054

Subject: O.A.No.2598/2001 filed by Shri Puran Singh
Khattar, Assistant Social Education Officer

(ASEO) – Passing of Presidential Orders as per direction of Hon'ble CAT, New Delhi.

Sir,

I am directed to refer to your letter No.DE/OQ/2598/01/AE/ASEO/10307 dated 17.06.2002 on the above subject and to say that matter has been re-examined in this Ministry in consultation with Ministry of Finance, Department of Expenditure. After due consideration of the whole issues involved, it has not been found possible to extend the higher pay scale of ₹ 6500-10500/- to Shri P.S. Khattar, ASEO at par with PGT as the post of ASEO is not a teaching post.

2. These orders are being issued with the approval of Minister for Human Resource Development.

Yours faithfully,

(ASHOK KUMAR)
Under Secretary to the Govt. of India

6. Thus, it is apparent that no conscious decision was taken by the petitioner in having rejected the representation of the respondent despite directions given by the Tribunal in O.A.No.2598/2001.

7. A contempt petition filed by the respondent was dismissed vide order dated 24.02.2003. The respondent, as stated above, filed a substantive petition vide O.A.No.1690/2003 for assailing the order of the Government of India dated 30.12.2002 seeking specific directions that the pay of the respondent be fixed in the scale of ₹6500-10500 with all consequential benefits. The aforesaid OA was allowed vide order dated 18.10.1997 with the directions as mentioned above. It is this order which is the subject matter of the present petition.

8. Assailing the order passed by the Tribunal it has been submitted on behalf of the petitioner that the post of ASEO which the respondent had been holding till his retirement cannot be equated with PGT teachers and therefore, the pay scale as is available to a PGT teacher as fixed by the 5th Pay Commission cannot be granted to the respondent who has been granted the pay scale of ₹5500-9000 in accordance with the pay

scale made applicable to the post of Assistant Social Education Officer.

9. It would be appropriate to take note of the Presidential order passed on 29.06.1972 which was the basis of filing O.A.No.2598/2001. As per the said order after the revision of the pay scale of teachers in 1967, 1970 and 1971, while dealing with revision of pay scales of certain interchangeable/left over categories as detailed in Annexure to the aforesaid letter, a direction was given to the concerned authorities including the Chief Secretary of Delhi Administration to fix the pay of the left over categories which also includes the post of ASEO and Assistant in the next higher stage with date of increment remaining unchanged. The pay scales which were admissible to the ASEO in the year 1970 was the pay scale of ₹350-25-400-30-700. According to the respondent the next higher grade which was to be accorded was the pay scale available to a PGT which was paid to them till the recommendations of the 5th Pay Commission were accepted and for the post of ASEO, the revised pay scale of ₹5500-9000 was made admissible though it was not in accordance with the pay scale recommended for PGT. To appreciate the issue, the Presidential Order dated 19.06.1972 which is the basis of the litigation between the parties is reproduced hereunder for the sake of reference:-

No.A.11014/14/72-UT.
Government of India
Ministry of Education and Social Welfare
New Delhi, the 29th June, 1972.

To

1. The Chief Secretary,
Delhi Administration,
Delhi.
2. The Chief Commissioner,
Andaman and Nicobar Islands Admn.
Port Blair.
3. The administrator,
Union Territory of Laccadives,
Minicoy and Amindivi-Islands,

P.O.Kavaratti Islands,
Via-H.P.O.Calicut.

Subject: Revision of scales of pay of Inter-changeable/left over categories of posts.

Sir,

I am directed to say that consequent on the revision or scales of pay of teachers in 1967, 1970 and 1971, the question of revision of pay scales of certain inter-changeable/left over categories has been decided by President to revise the scales of pay of the posts indicated in the statement attached to this letter. The revision of pay will be effective from 21st December, 1967 as indicated in column (4) and from 27th May, 1970 as indicated in column (5).

2. The pay in the revised pay scales will be fixed at the next higher stage with date of increment remaining unchanged. The arrears are also payable.

3. I am also to request that the designations of the various posts should be suitably changed to indicate their equation with the main categories of teachers.

4. The expenditure involved should be met from the sanctioned budget of the Administration for the current year.

5. The pay scales effective from 27th May, 1970, are subject to modifications by the Third Pay Commission. The above decisions are therefore, not intended to prejudice the examination of the case by the Third Pay Commission along with the cases of other categories of Government employees and will be liable to revision as decided by the Government after considering the report of the Pay Commission.

S.No.	Name of the Post	Scale of pay prior to 21.12.1967	Scale of pay applicable from 21.12.1967	Scale of pay applicable from 27.05.70
1	2	3	4	5
17.	Subject Specialist	350-15-475-EB-20-650	350-15-475-EB-20-650	400-30-640-EB-40-800
18	Assistant Social Education Officer and Assistant District Inspector.	250-10-290-15-380-EB-15-470.	275-10-295-15-370-EB-15-490-EB-20-550	350-25-400-30-700.

10. Since the pay scale which was made admissible to PGT after the recommendation of the 5th Pay Commission was not extended to ASEO, the respondent herein taking benefit of the aforesaid Order dated 29.06.1972 filed O.A.No.2598/2001. The grievance of the respondent

was that though both under the 3rd and 4th Pay Commissions recommendations the post of ASEO was placed in the same scale of pay as PGT, the pay scale of PGTs recommended under the 5th Pay Commission (CPC) was not accorded to ASEO. The respondent has impugned order dated 28.10.1997 issued after Fifth Pay Commission's recommendations were made, whereby ASEO's were placed in the revised scale of ₹5500-9000, while PGTs were accorded the pay scale of ₹6500-10500, though prior to the 5th CPC both categories were getting the pay scale of ₹1640-2900. The respondent has sought direction to petitioner to fix his pay in the pay scale of ₹6500-10500 w.e.f. 1.1.1996 with consequential benefits including arrears of pay with interest, besides quashing of the order dated 28.10.1997.

11. According to the respondent the Education Department of Delhi Administration did propose equation of the category of the post of ASEO i.e. of the respondent to the post of PGT and in accordance with the Presidential sanction a decision was taken to revise the scales of pay of interchangeable/leftover categories which included the post of ASEO having the pay scale of prior to 21.12.1967 as ₹250-470 and were placed in the scale of pay of ₹270-530 w.e.f. 21.12.1967 and in the pay scale of ₹350-700 w.e.f. 27.05.1970 which pay scales were also given to PGT. The other ground which was taken by the respondent was, that ASEO's were even transferred as PGTs. It was also contended that the post of PGT and ASEO as per the recruitment rules for the post of Vice Principal were feeder cadre to the said post and therefore, there was no reason to discriminate with the respondent as against PGTs by placing them in the pay scale of ₹5500-9000 which was lower to the grade of ₹6500-10500 and accordingly prayer was made to revise the pay scale granted to ASEO's also w.e.f. 01.01.1996 so as to make it equivalent to the pay scale admissible to PGT.

12. The aforesaid application of the respondent was contested primarily on the ground of limitation which was not accepted by the Tribunal. According to the Tribunal it is established that ASEO and

Assistant District Inspector had been drawing the same scale as PGTs w.e.f. 21.12.1967. They have continued to draw identical pay scales till the recommendations of 5th CPC were effected w.e.f. 1997. The Tribunal was also guided by the fact that as per the order dated 11.12.1997 which was placed on record before the Tribunal in the earlier O.A., it stood established that posts of ASEOs and PGTs are equivalent and interchangeable and have been drawing the same scales of pay during the 3rd and 4th CPCs till 31.12.1995. However, on account of the Government order dated 28.10.1997, applicant was granted the pay scale of ₹5500-9000 as ASEO which is inferior to the scale of PGT which was placed in the pay scale of ₹6500-10500 before the Tribunal in the first round of the only ground which was taken by the petitioner to oppose the stand of the respondent was that the post has not been equated with the teaching posts vide memo dated 05.06.1998 issued by Director (UT), Government of India, Ministry of Human Resources Development (Department of Education). The Tribunal relying upon the Presidential order dated 29.06.1972 whereby the post of ASEO was equated with the post of PGT and accorded the same scale of pay right from 1967 to 1995 held that the said orders will certainly have precedence over the orders issued by a Director of the Department of Education without obtaining Presidential orders for suppression of the earlier orders and denying equation of the post of ASEO with PGT. On the basis of the aforesaid discussion, directions as stated above were given to the respondents vide order dated 10.05.2002.

13. Assailing the order, the respondent filed O.A.No.1690/2003 which has been allowed by the Tribunal. According to the petitioner his pleadings/grounds in the present O.A. are almost same as pleaded by the respondent in his previous O.A. and no new point has been raised and therefore the application is barred by res judicata and is also barred by limitation.

14. However, the aforesaid grounds have not found favour by the Tribunal. One other ground which was taken before the Tribunal by the

petitioner was that the Presidential order dated 29.06.1972 stood superseded by a later order issued with the sanction of the President dated 28.10.1997 whereby for the post of ASEO the revised pay scale in the pay scale of ₹5500-175-9000 only was sanctioned. A bare perusal of the aforesaid order goes to show that the revised order is not based upon consideration of the relevant facts raised by the respondent i.e. their equivalence as has been accepted by the President's earlier order with that of the post carrying out higher pay scale which was the pay scale given by PGT and second that the post was interchangeable with similar categories of posts and further that it also forms part of a feeder cadre along with the post of PGT in the next post of Vice Principal. Moreover, the order had to be only of prospective effect which has been obviously passed after about 6 years since when the 5th Pay Commission stands implemented. It is a matter of record that the observations made by the Tribunal in O.A.2598/2001 were not assailed by the petitioner before any higher Court.

15. The Tribunal therefore, did not agree with the submissions of the petitioner and allowed the O.A. filed by the respondent. Some observations made by the Tribunal are reproduced hereunder:

“11.It is trite law that in the matter of pay scale only expert bodies are competent to make recommendations and the Government to approved it. Equal pay for equal work and parity in pay scale can be a subject matter of interference in a judicial review if the hostile discrimination under Article 14 and 16 of the Constitution of India is made out.

12.It is also not dispute that till Fourth CPC, applicant was treated in the matter of pay scale at par with TGT. It is also not in dispute that till 30.12.2002 when the presidential order came as regards recommendation of pay scale of equivalent post, the post of ASEO has been equated with PGT. In **Fifth CPC, there were no recommendations of higher pay scale to the ASEO as this category was not considered.** However, PGTs have been given a recommendation to be placed in the pay scale of ₹ 6500-10500 as per the qualifications, discharge of duties and other modalities attached to the post.

13.In the earlier OA, the Tribunal was of the view that since 1967 in the light of the presidential order, the parity has

been drawn between the post of ASEO and PGT insofar as pay scales are concerned. In the present case, any executive instruction (s) or order (s), i.e., impugned order 28.10.1997 whereby the applicant was placed in the pay scale of ` 5500-9000 as a replacement scale, the presidential order (s) will have precedence over the order issued by the executive. **However, a finding has also been arrived at that the post is interchangeable and the post of ASEO is a feeder cadre post for promotion to the post of Vice Principal.** In this view of the matter, the order placing the applicant in the lower pay scale was set aside with a direction to the respondents to re-consider the claim and in the light of any adverse decision regarding revision of pay scale, Presidential order should have been obtained.

14. In our considered view, the present litigation, which is founded on the cause of action, i.e., presidential order of 30.12.2002, cannot be ousted on the principle of res judicata. The condition precedent for its applicability is attainment of finality of the issue between the parties. **As in Contempt Petition, referred to above, liberty has been given to the applicant to raise his grievance and the fact that the issue raised is applicability of presidential order in retrospect is res integra.** The objection is overruled.

15. The presidential order unless specifies cannot be extended in retrospect. The presidential order is something which has a higher footing than an executive instruction. The executive instructions cannot be applied retrospectively. **Accordingly, the earlier decision of the president, which was in vogue till 29.12.2002 has been overridden by the impugned order dated 30.12.2002.** *(It is admitted fact that the respondent retired on 30.10.2002) that is before passing of the impugned order.* The claim of the applicant is for grant of higher scale of ` 6500-10500 on comparison with the post of PGT, as regards interchangeability is concerned, the same has been laid at rest by the earlier decision, any contrary observation would amount to sitting over as an appellate authority over the finding of the coordinate Bench. Moreover, we find that respondents own order dated 2.12.1970 has clearly placed the ASEOs equivalent to PGTs as regards transferability is concerned.

16. As regards recommendations of Fifth CPC are concerned, we find that higher scale has been granted under para 55.29 to the PGTs. **The cadre of ASEO itself is a dying cadre and the same has been abolished with the retirement of the applicant, no specific recommendation has been made with regard to this cadre. However, the fact that**

the applicant was being treated at par in the matter of pay scale up to Fourth CPC and there has been orders to its interchangeability with PGT. The presidential order would not be in effect retrospectively. Accordingly, we are of the concerned view that in the matter of pay scale though expert bodies are recommandary body but yet discrimination which offends Article 14 and 16 of the Constitution of India cannot be overlooked. Once the applicant has been treated at par without any recommendations of third and Fourth CPCs regarding interchangeability and equated with PGT. He is also entitled to pay scale till issue of presidential order on 30.12.2002. We do not find either any intelligible differentia or reasonable nexus in the action of the respondents with the object sought to be achieved in depriving of the applicant of higher scale of PGT.”

16. We concur with the reasoning given by the Tribunal for following reasons:-

- i) The reasoning given by the Tribunal in O.A.No.1690/2003 for equating the post of ASEO (with left over post) with that of the PGT was based upon Presidential Order dated 29.06.1972 which had been accepted by the petitioners at least till recommendations of 4th Pay Commission were accepted. The 5th Pay Commission has not provided for any separate pay scale for the post held by the respondent i.e. ASEO.
- ii) No reason is available as to why the post of ASEO being interchangeable with PGT and also being a feeder cadre for the post of Vice Principal, was not being given the similar pay scale.
- iii) The only reason to deny higher pay scale given by the petitioner is that it is not a teaching post is of no consequence because the counseling which has to be done by a ASEO involves much more than what a teacher has to do and therefore in no way they can be treated inferior to the teachers. In any case when the said post is also a feeder cadre for the post of Vice Principal the next higher post and as is apparent from reading their recruitment rules of the post of Vice Principal available on file from page 60 to 68 and which has not even been referred to in the order dated 30.12.2002,

the reasoning given by the Tribunal cannot be faulted with.

- iv) Moreover, the cadre of the respondent being a dying cadre and he being the only officer who also stands retired and has already been paid the benefit of the higher pay scale, we find no reason to interfere with the directions of the Tribunal and consequently we dismiss the writ petition.

17. As regards the limitation the very fact that the first O.A. was allowed in their favour by the Tribunal and the second O.A. is only in the nature of execution of the earlier order filed soon after the dismissal of the Contempt Petition, the issue of limitation is of no consequence at all.

18. The petitioner has relied upon the following judgments:

i) E.Parmasivan & Ors. Vs. UOI & Ors., (2003) 12 SCC 270

(ii) State of West Bengal & Anr. Vs. West Bengal Minimum Wages Inspectors Association & Ors. (2010) 5 SCC 225.

19. We have considered the above judgments cited on behalf of the petitioner but these judgments do not come to their rescue taking into consideration the totality of the facts discussed above.

20. In view of the aforesaid the judgment of the Tribunal is upheld and the writ petition filed by the petitioner is dismissed with no order as to costs.

(MOOL CHAND GARG)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

SEPTEMBER 20, 2010
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