

\$~10

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

%

Date of Decision: February 25, 2013

+

W.P.(C) 1254/2012

DIGAM SINGH

..... Petitioner

Represented by: Mr.Amit Gupta, Advocate.

versus

ANSHU PRAKASH & ORS.

..... Respondents

Represented by: Ms.Zubeida Begum and Ms.Sana Ansari, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J. (Oral)

1. The writ petitioner was appointed, on contract basis, as a qualified paramedic by Government of NCT of Delhi on July 23, 1998 and the terms of engagement were that he would be paid a fixed amount each month. The engagement continued with a break of one day after 89 days each and the writ petitioner filed OA No.2235/1999 praying before the Tribunal that the principle of equal pay for equal work was violated. The said petition registered as OA No.2235/1999 was disposed of by the Tribunal directing that on the principle of equal pay for equal work the petitioner should be paid pay and allowances at par with regular employees with effect from March 2000.

2. As pleaded in para 4(vi) of the writ petition, respondents started paying salary and allowances to the petitioner as were given to the regular

employees but without any increment. We note the pleadings in para (vi).

They read as under:-

“(vi) It is submitted that in partial compliance of the order of the Tribunal the respondents started giving allowances to the petitioner as was being given to the regular employees but failed to give the annual increment in the salary as afforded to the regular employees similarly situated.”

3. But, the practice of disengaging service by a day and taking back the petitioner on contract basis continued compelling petitioner to file yet another Original Application registered as OA No.1566/2003 which was disposed of on September 29, 2003 directing that the respondents would be bound by the directions issued in OA No.2235/1999 and further that till regular appointments were made, the services of the petitioner would not be disengaged.

4. In the year 2010 the petitioner filed a contempt petition registered as CP No.737/2010 disclosing therein that whereas DA, HRA, CCA, TA and PCA were being released to him, increments in the basic pay were being denied.

5. The contempt petition has been dismissed by the Tribunal vide impugned order dated November 08, 2011 and the view taken is that limitation as per Section 20 of the Contempt of Courts Act is one year from the date on which the contempt is alleged to have been committed. Since violation alleged was of the order passed by the Tribunal on July 24, 2001 (somewhere referred to as April 24, 2001) the contempt petition filed was barred by limitation. The petitioner challenges before us the order dated August 08, 2011.

6. Learned counsel for the writ petitioner refers to the under-noted nine decisions to bring out the point that a matter pertaining to payment of wages

would be treated as a continuous cause of action and right can be imposed any time:-

- (a) (1995) 5 SCC 628 M.R.Gupta v. Union of India & Ors.;
- (b) (2008) 8 SCC 648 Union of India v. Tarsen Singh;
- (c) (2010) 12 SCC 538 State of Madhya Pradesh & Ors. v. Yogendra Shrivastava;
- (d) 1989 Suppl. (2) SCC 418 Firm Ganpat Ram Rajkumar v. Kalu Ram & Ors.
- (e) 2000 Cri.L.J. 2709 Lopaben Patel v. Hitendra Rambhai Patel;
- (f) (2009) 154 PLP D-13 Santosh Kapoor v. Apex Computers P. Ltd.;
- (g) 1991 RLR 410 Master Dhruv Goyal v. Anand Perkesh;
- (h) 2002 (2) Bom C.R. 459 Nagdevi Kamgar Sabha v. Hiralal Maganlal & Co. & Ors.;
- (i) 2003 Cri.L.J. 746 Ratan Chandra Sharma & Anr. v. Kum.Sheetal Sharma.

7. But the argument overlooks the fact that the decisions pertained to an original action brought before the Court having a bearing on wages and the law declared is that as long as an issue pertaining to wages is not decided, an employee having a grievance can approach a Court any time. Upon the claim succeeding the Court would not direct such payments where claim would be barred by limitation when the person approached the Court. The instant situation is entirely different. The petitioner already has a judicial verdict in his favour and in contempt proceedings he was seeking enforcement of said judicial verdict.

8. Let us trace the concept of a continuing wrong and the associated problem in identifying as to which offence would be a continued wrong.

9. The origin of the concept of a continuing wrong could be traced to the concept of a continuing cause of action in a civil matter. The concept of continuing cause of action arose principally in regard to the point of time up to which damages could be assessed in a given action and way back in the year 1804, in the decision reported as (1804) 1 Ch. 298: 7 R.84 (70) LT 52 Hole Vs. Chard Union, Lord Lindley had observed:-

“What is a continuing cause of action? Speaking accurately, there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought.”

10. In the same decision Lord Justice A.L.Smith concurred in the following words:-

“If once a cause of action arises, and the acts complained of are continuously repeated, the cause of action continues and goes on de die in diem. It seems to me that there was a connection in the present case between the series of acts before and after the action was brought; they were repeated in succession, and became a continuing cause of action. They were an assertion of the same claim – namely, a claim to continue to pour sewage into the stream – and continuance of the same alleged right. In my opinion, there was here a continuing cause of action within the meaning of the rule.”

11. This is how, in civil law, a continuing cause of action was understood; and a closer look would show that a *recurring cause of action* i.e. same act which constitutes the original wrong is repeated again and again would have been a better phrase. Thus, a continuing cause of action would be a recurring cause of action; or to put it differently the phrases ‘continuing cause of action’ and ‘recurring cause of action’ would be synonyms.

12. In its mutated application as a concept of a *continuing offence*, way back in the year 1937, speaking for the Full Bench of the High Court of

Judicature at Bombay, Beaumont C.J. in the decision reported as AIR 1937 Bom. 1 (FB) Emperor Vs. Chotta Lal Amar Chand expressed:-

“..... That you can have a continuing offence in the sense in which you can have a continuing tort, or a continuing breach of contract, and I doubt, myself whether the assumption is well-founded, having regard to the provisions of the Criminal Procedure Code as to the framing of charges and as to the charges which can be tried at one and the same trial. It is quite clear that you could not charge a man with committing an offence ‘de die in diem’ over a substantial period.”

13. Yet in spite thereof, since, in relation to limitation, a continuing offence pertaining to contempt finds a statutory enactment, notwithstanding the inherent problem in the very import of the concept of a continuing cause of action with respect to a continuing offence, courts have always struggled to outline, on case to case basis, whether or not it is a case of a continuing offence or not.

14. An understanding of the concept of a continuing wrong could be with respect to the decision of the Bombay High Court reported as AIR 1955 Bom. 161 State Vs. A.H.Bhiwandiwalla wherein the accused was charged for the offence of (i) failure to apply for registration of his factory and give notice of occupation thereof; and (ii) run the factory without a license under the Factories Act 1948. For the former offence it was held that the same was not a continuing offence and qua the latter it was held to be a continuing offence. The decision guides that whereas the former was not an act repeated akin to an act causing an injury repetitively, the latter was an act akin to an act repetitively causing injury as and when the act was repeated. This is the way in which the aforesaid decision reconciled the concept of a continuing cause of action or a recurring cause of action as understood in civil law with respect to the concept of a continuing offence.

15. The decision of the Supreme Court AIR 1959 SC 798 Bal Krishna Savalram Pujari & Ors. Vs. Sh. Dayaneshwar Maharaj Sansthan & Ors. makes us understand, with greater clarity, as to what would be the essence of a continuing offence. It was observed:-

“It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by a wrongful act and what may be described as the effect of said injury.”

16. Thus, the effect of the injury being felt at a point of time subsequent to when the act was done and its distinction with the injury caused being continued has to be kept in mind, for the reason the distinction is subtle and if the subtlety is ignored, the line may get blurred.

17. We write aforesaid only for posterity inasmuch as we find that on merits, the petitioner has no case inasmuch as, as admitted in the writ petition, which pleadings we have noted herein above, the writ petitioner admits receiving salary at the basic of the scale with all other allowances and claims that the contempt committed is of not granting annual increments. We would simply highlight that the order passed by the Tribunal simply states that the petitioner should be paid wages and allowances at par with regular employees and does not state that annual increments should be granted. The petitioner is not a regular employee and any direction to pay increments would make petitioner a de-facto regular employee.

18. The issue has been the subject matter of an opinion of a Division Bench of this Court in WP(C) No.8764/2008 Govt. of NCT of Delhi v. Victoria Massey.

19. Para-medical employees working on contract basis in various hospitals established by the Government of NCT Delhi started claiming pay parity with regularly appointed para-medical staff. They started claiming increments and various allowances which were being paid to regular employed para-medical staff. So did the petitioner.

20. Noting a conflict between view taken by two Division Benches of the Central Administrative Tribunal, OA No.1330/2007 Mrs. Victoria Massey Vs. NCT of Delhi was referred to a Full Bench of the Tribunal. Answering the reference and simultaneously deciding OA No.1330/2007 vide order dated July 23, 2008, the Full Bench opined that there being complete similarity in the work performed by the contractual employees they would be entitled to be paid same wages including allowances as also increments as were paid to regular employees.

21. The said decision of the Tribunal was challenged before this Court vide WP(C)No.8764/2008 Government of NCT of Delhi Vs. Victoria Massey. Three other writ petitions including WP(C)No.8476/2009 were decided by a common order dated May 22, 2009. The Division Bench noted the underlined paragraphs of the opinion of the Full Bench of the Tribunal:-

“Several of the Staff Nurse initially engaged on contract basis, although were for a certain period being paid consolidated pay, as a result of the directions of the Tribunal, as upheld by the High Court, presently are getting salary as is admissible to a regular staff, in all respects. It is also pointed out that in the meanwhile there was proposal for regularization of eligibles by prescribing for a test and some of the staff nurses were successful in the selection and have been absorbed by the

Establishment. But as far as the applicants are concerned, they have not been able to cross the hurdle of test. But this is altogether a different issue and in any case irrelevant for the adjudication of the present OA.

What is under challenge is the attempt of the respondents to deny the benefit of equal pay to the applicants herein on the strength of a circular, which had been issued on 03/02/2005, which, according to the respondents, have superseded the circular dated 12/09/2002. The presence of circular had been highlighted only when the matter was being heard by the Division Bench. A copy of the same has been made available to us as issued by the Additional Secretary to the Government of NCT. It reads as following:

“It is informed that the Finance Department, Government of NCT of Delhi, in a matter regarding grant of equal pay to contractual staff as given to regular incumbents, had decided not to pay regular scales of pay to contractual staff except the beneficiaries of Hon’ble CAT orders.

Therefore all the Head of Hospitals and Medical Institution under Government of National Territory of Delhi are hereby requested to implement the above direction of Finance Department strictly.”

The applicants in the OA have only made reference to the representations submitted by them requesting the respondents to pay the higher emoluments submitted later on. Perhaps, they have not been informed of the impediment brought by circular dated 03/02/2005. Although it is not under specific challenge, we feel that the larger question whether the applicants will be entitled to salary on par with the regular staff could be gone into notwithstanding the presence of the abovesaid circular, without driving them for further round of litigation, and overruling technicalities.

The circular would show that the attempt and effort is to confine the benefits of higher emoluments only to persons who had obtained orders from CAT. Although the respondents argue for a position that this course is legally permissible, we do not think it may be a satisfactory approach. If the circular is held as operative, it may result in.

(a) Different principles of payment of salary to persons similarly working in the same institution.

(b) There will be indirect suggestion to such employees, who could not get the benefits so far to approach the Tribunal and get orders similar to the orders, which had been secured by their colleagues.

Both the circumstances are not to be encouraged especially as coming from Governmental Authorities. Withholding of pay, declared as admissible and due to the staff members, to a section of staff cannot be considered as good governance. By becoming penny wise, the Government would be pound foolish, since the credibility of the organization and who are responsible for running it would be at stake.”

22. After noting the aforesaid paragraphs of the opinion of the Full Bench of the Tribunal, the Division Bench observed :-

“Therefore, as regards grant of same salary and allowance to the respondent herein, which are admissible to regularly appointed staff nurses, there cannot be any quarrel the respondents will, therefore be entitled to those benefits.”

23. But on the subject of being entitled to the grant of increments as well as promotions, noting the following directions issued by the Tribunal:-

“Taking the totality of facts and circumstances into consideration, we come to the conclusion that applicant is entitled to all the benefits in terms of salary, allowances, promotion etc. which have been extended to other Staff

Nurses, who were recruited during the period of strike of nurses in the year 1998.”

the Division Bench observed :-

“The legal position in this regard is that casual or contract employees are not entitled to increments and would get pay at the minimum of the regular pay scale. In the absence of regularization, question of consideration of cases for promotion also would not arise. While that is the position in law, we have no information as to whether other Staff Nurses appointed on contract basis, who had approached the Tribunal and this Court earlier for pay parity and were granted relief, have been granted increments or not. In case the petitioner had given to those nurses appointed on contract basis benefit of increment, then it would be extended to the respondents herein as well on the principle of equality and equal treatment. However, if such a benefit has not been granted to other similarly situated staff nurses appointed on contract basis, then the respondents herein also shall not be entitled to benefit of other increment or promotion. All these writ petitions are disposed of in the aforesaid terms. Petitioner shall work out the arrears of salary payable to the respondents in terms of aforesaid directions. Arrears will be calculated from the date when these respondents filed the OA. If the payment is not made within two weeks, respondents will be entitled to approach the Court for withdrawal of the amount deposited in the Court.”

24. Needless to state the view taken by the Division Bench of this Court is a partial modification of the directions of the Full Bench of the Tribunal in Victoria Massey’s case.

25. As per the view taken by the Division Bench of this Court, contract para-medical employees would be entitled to same pay and benefit as regular employees but in the minimum of the pay scale without grant of any

increment unless they could show to the Tribunal that similarly situated contractual employee was being granted benefit of increments.

26. The reason is obvious. There cannot be complete parity between contractual employees and those who undergo selection process and are appointed as regular employees. On the principle of '*same work same pay*', if there is complete identity of work between contractual employees and regular employees a court can direct same basic salary and allowances to be paid. But with reference to one set of persons not having undertaken the selection process and the second set having undertaken the selection process, the court could deny the benefit of increments.

27. Thus, we dismiss the instant petition for the reason it would be useless to restore the contempt petition filed by the petitioner.

28. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

FEBRUARY 25, 2013
dkb