

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

% *Judgment Reserved on: October 06, 2015*  
*Judgment Delivered on: October 09, 2015*

+ **LPA 188/2010**

RAM NIWAS ..... Appellant  
Represented by: Mr.Sanjay Ghose, Advocate

versus

SOUTH DELHI MUNICIPAL CORPORATION ..... Respondent  
Represented by: Mr.Mukesh Gupta, Advocate

**CORAM:**  
**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**  
**HON'BLE MS. JUSTICE MUKTA GUPTA**

**PRADEEP NANDRAJOG, J.**

1. The appellant Ram Niwas claimed a right to be promoted as a Garden Choudhary w.e.f. June 16, 1997 with consequential benefits and the dispute was referred to the Labour Court by the Competent Authority on April 04, 2003.
2. Vide Award dated January 07, 2005, while denying the entitlement to be promoted as a Garden Choudhary w.e.f. June 16, 1997, the learned Labour Court directed that Ram Niwas would be paid wages in the pay scale applicable to the post of Garden Choudhary w.e.f. June 16, 1997 because the evidence was that notwithstanding he being appointed as a Mali on permanent basis since March 16, 1986 he was directed orally by the Assistant Director (Horticulture) to discharge duties of a Garden Choudhary w.e.f. June 16, 1997. As per the Tribunal, Ram Niwas could therefore not

be denied wages applicable to the post of a Garden Choudhary.

3. Challenge by the erstwhile Municipal Corporation of Delhi to the Award succeeded when the writ petition filed by the erstwhile Municipal Corporation of Delhi was allowed vide impugned decision dated September 15, 2009. The reason given by the learned Single Judge is that the verbal instruction given by the Assistant Director (Horticulture) would not entitle Ram Niwas to receive salary applicable to the post of Garden Choudhary in view of the law declared by the Supreme Court in the decision reported as (1997) 6 SCC 200 Mohd. Swaleh Vs. UOI & Ors.

4. The appellant relies upon two decisions, one rendered by the Supreme Court reported as (2013) 4 SCC 152 Arindam Chattopadhyay & Ors. Vs. State of West Bengal & Ors. and the other rendered by a Division Bench of this Court reported as 2011 (IV) AD (Delhi) 485 Municipal Corporation of Delhi Vs. Sultan Singh & Ors.

5. It is the case of the appellant himself that by an oral direction by the Assistant Director (Horticulture) he was assigned duties as a Garden Choudhary but with a clear instruction that he would continue to receive salary in the pay scale of a Mali : the post held on substantive basis by the appellant.

6. The erstwhile Municipal Corporation of Delhi had adopted the Fundamental Rules. This is not in dispute. Clause (i) of Fundamental Rule 49 is relevant to be noted because it deals with the entitlement of a Government servant to higher wages on being asked by way of officiation or as a temporary measure to discharge duties of a higher post. It reads as under:-

*“FR 49 – The Central Government may appoint a*

*government servant already holding a post in a substantive or officiating capacity, to officiate, as a temporary measure, in one or more of other independent posts at one time under the Government. In such case, his pay is regulated as follows:*

*(i) where a government servant is formally appointed to hold full charge of the duties of a higher post in the same office as his own and in the same cadre/time of promotion, in addition to his ordinary duties, he shall be allowed the pay admissible to him, if he is appointed to officiate in the higher post, unless the competent authority reduces his officiating pay under Rule 35; but no additional pay shall, however, be allowed for performing the duties of a lower post;*

*(ii)-(vi) ..... ”*

7. In Mohd. Swaleh's case (supra), the Supreme Court emphasized that as per the Fundamental Rule 49 the government servant needs to be formally appointed to hold charge of a higher post and this means by a competent officer. Since the Vice-Chairman of the Central Administrative Tribunal did not have the power to appoint Mohd. Swaleh to discharge duties as a Registrar, the Supreme Court held that Mohd. Swaleh would not be entitled to the paid salary applicable to the post of the Registrar of the Central Administrative Tribunal. The plea based on quantum meruit to sustain higher wage for more onerous work done was rejected. Thus, one could say that the principle : That having worked for a long time discharging onerous duties of a higher post would justify payment of more wages was rejected by the Supreme Court.

8. In Arindam Chattopadhyay's case, the Supreme Court not only noted that Arindam Chattopadhyay had worked for years together as a Child

Development Project Officer notwithstanding substantive post held by him was that of an Assistant Child Development Project Officer, but additionally that the competent authority had with the concurrence of the Finance Department appointed Arindam Chattopadhyay as the Child Development Project Officer, albeit with the condition that he would draw salary in the existing pay scale of the Assistant Child Development Project Officer. Thus, it was held that Arindam Chattopadhyay would be entitled to the salary in the pay scale of the post of Child Development Project Officer.

9. Thus, it matters in law, whether the appointment to the higher post is by a competent authority or not.

10. Reliance by the appellant on the decision in Arindam Chattopadhyay's case (supra) is thus misconceived.

11. But as noted above, the appellant has another string in his bow. The decision of a Division Bench of this Court in Sultan Singh's case.

12. The decision no doubt does not note the distinction in law on basis whereof the decision in Arindam Chattopadhyay's case and the decision in Mohd. Swaleh's case can be harmonized. The law declared by the Division Bench is contrary to the law declared by the Supreme Court and thus the decision would not be a binding precedent. But, the problem is that the said decision also concern Malis directed to discharge duties as Garden Choudhary by their respective Assistant Directors (Horticulture). Sultan Singh & Others had filed a writ petition in this court praying that they should be paid salary to the post of Garden Choudhary because they were discharging duties as a Garden Choudhary. The writ petition was transferred to the Central Administrative Tribunal because of a notification issued making applicable the provisions of the Central Administrative

Tribunal Act, 1985 to the erstwhile Municipal Corporation of Delhi. On January 29, 2010 the Administrative Tribunal, Principal Bench at New Delhi granted relief to Sultan Singh & Ors. Challenge by the Municipal Corporation of Delhi failed. The said decision has attained finality and has been implemented.

13. There cannot thus be a situation where identically placed Malis working as Garden Choudhary can be discriminated against. Either all or none can receive wages in the post of a Garden Choudhary.

14. On the peculiar facts of this case as noted above, because similarly situated persons holding substantive post of Mali but working as Garden Choudhary under the oral directions of Assistant Director (Horticulture) are being paid salary in the pay scale to the post of Garden Choudhary, we allow the appeal and set aside the impugned decision dated December 15, 2009. The writ petition filed by the erstwhile Municipal Corporation of Delhi against the appellant is dismissed and the direction in the Award in favour of the appellant is restored.

15. No costs.

**(PRADEEP NANDRAJOG)**  
**JUDGE**

**(MUKTA GUPTA)**  
**JUDGE**

**OCTOBER 09, 2015**

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