

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Harish Tandon

And

The Hon'ble Justice Prasenjit Biswas

FMA 1046 of 2022

with

CAN 1 of 2022

Indian Maritime University & Ors.

Vs.

Nurul Islam Khan & Ors.

For the Appellant : **Mr. Puspall Chakraborty, Advocate**
Mr. Debabrata Das, Advocate
Mr. Saptarshi Mukherjee, Advocate
Mr. Tirthankar Nandi, Advocate

For the Respondent : **Mr. Subhabrata Dutta, Advocate**
Mr. Jatindra Barik, Advocate

Heard on : August 16, 2024

Judgment on : August 16, 2024

The Court:

1. The affidavit-in-opposition to the application being CAN 1 of 2022 filed on behalf of the respondent is taken on record.
2. The University has filed the instant mandamus appeal assailing the judgment and order dated 02.02.2022 passed by the Single Bench in WPA 18616 of 2021 by which the University was directed to implement the Resolution dated 28.09.2016 taken by the Executive Council of the Indian Maritime University and comply the directions of the Director General of Shipping dated 15.01.2018 and extend the benefit of the revised HRA under the Seventh Central Pay Commission to the petitioner without any further delay.

3. It is manifest from the record that in the Minute of the 36th Meeting of the Executive Council held on 28.09.2016, one of the agenda was in relation to implementation of the recommendation of the Seventh Central Pay Commission as approved by the Ministry of Finance to the MERI Mess Employees of IMU Kolkata and IMU Mumbai Campus. The resolution would further reveal that the benefit of the earlier Pay Commissions were extended to the MERI Mess employees on the basis of the recommendation of the Finance Committee and in the tune and line with the same, the benefit under the Seventh Central Pay Commission was also extended to the MERI Mess employees. It is nobody's case that on the basis of the recommendation of the Seventh Central Pay Commission, the pay scale and other components were given to the writ-petitioner/respondent but the dispute revolves around the denial of enhanced House Rent Allowance (HRA) in conformity with such recommendation.
4. Interestingly, the plea was taken by the appellant/University that the MERI Mess employees are not the employees of the University and, therefore, they cannot claim HRA at the rate recommended in the Seventh Central Pay Commission.
5. The Single Bench have considered the aforesaid aspect and also took into account the various provisions and ultimately reached to the conclusion that the stand of the University, that the MERI Mess employees are not entitled to enhanced rate of HRA, is not acceptable.
6. The Counsel for the appellant tries to convince this Court that unless it is established that the relation between the University and the writ-petitioner/appellant is that of employer and employee or master and servant, they cannot claim the benefit extended to the employees and placed reliance upon the judgment of the Supreme Court in case of ***Dharagadhra Chemical Works Limited Vs. State of Saurashtra & Ors.*** reported in ***AIR 1957 SC 264***. It is further submitted that the dearness allowance is within

the discretion of the employer and, therefore, the employee cannot claim the dearness allowance as a right in relation to his service. To support the aforesaid contention, reliance is placed upon the judgment of the Apex Court in case of ***State of Madhya Pradesh Vs. G.C. Mandawar*** reported in ***(1954) 1 SCC 970***.

Page | 3

7. The Counsel for the respondent, on the other hand, refuted the contention of the appellant and submits that once the benefit of the recommendation of the Seventh Central Pay Commission is extended to the MERI Mess employees, there is no scope of segregating such benefits or, in other words, extending the benefits in segregated manner. It is further submitted that all the benefits has to be extended the moment the recommendation of the Seventh Central Pay Commission has been accepted and, therefore, the contention of the appellant is not tenable.
8. It is beyond cavil of doubt that in the 36th meeting of the Executive Council held on 28.09.2016, the recommendation of the Seventh Central Pay Commission was expressly extended to the MERI Mess employees with the rider that henceforth the IMU Mumbai and IMU Kolkata, Campus shall not recruit any such employee in future. The Resolution further revealed that the benefit of the third, fourth, fifth and sixth Central Pay Commission was extended to the MERI Mess employees in an earlier decision of the Ministry of Shipping and the Executive Council and taking into account the aforesaid fact that the benefit of the earlier Central Pay Commission was extended to the MERI Mess employees and, therefore, the benefit under the Seventh Central Pay Commission should also be extended to such employees.
9. There appears to be a uniformity in the decision and it does not come out from either of the parties that the component of HRA was not revised on the recommendation of the earlier Central Pay Commissions. It is only when the Seventh Central Pay Commission recommended the percentage of HRA applicable in the different categories of the Cities on the basis of the dearness allowance; the

University retracted from the decision of the Executive Council and tried to contend that HRA cannot be revised on the basis of the recommendation of the Seventh Central Pay Commission. It does not appear from the record that the recommendation of the Seventh Central Pay Commission was not accepted in toto rather the Ministry of Finance accepted such recommendation including the recommendation relating to the percentage of HRA which the employee would be entitled to, based upon the percentage of DA declared by the Government and/or revised on a half-yearly basis. The moment the recommendation is accepted, its implementation cannot be segregated by the authority of its own. The HRA was revised in terms of the implementation of the earlier Central Pay Commission's recommendation and, therefore, there is no justification on the stand of the University that even though the recommendation of the Seventh Central Pay Commission is extended to the MERI Mess employees, yet the HRA component is liable to be segregated therefrom.

10. Having held so, let us consider the judgments relied upon by the appellant in this regard.
11. In case of Dharangadhra Chemical Works (supra) the question fell for consideration, what should be the *prima facie* or litmus test for determination of the relationship between the master and servant or employer and employee? It has been held that if one is in a position to dominate and control the manner of the execution of the works or the act to be done by the other, it creates a relationship of master and servant in the following:-

“13. The principle which emerges from these authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at page 23 in Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd., and Another (1), " The proper test is whether or not the hirer had authority to control the manner of execution of the act in question.

18. There is considerable force in this contention of the respondents. The question whether the relationship between the parties is one as between

employer and employee or between master and servant is a pure question of fact. Learned counsel for the appellants "relied upon a passage from Batt's "Law of Master and Servant", 4th edition, at page 10:-

" The line between an independent contractor and a servant is often a very fine one; it is a mixed question of fact and law, and the judge has to find and select the facts which govern the true relation between the parties as to the control of the work, and then he or the jury has to say whether the person employed is a servant or a contractor. "

Page | 5

This statement, however, rests upon a passing observation of Mc Cardie, J. in Performing Right Society Ltd. v. Mitchell and Booker (Palais de Danse)(1) and is contrary to the opinion of authorities which lays down that whether or not in any given case the relation of master and servant exists is purely one of fact. (Vide Halsbury's "Laws of England", Hailsham edition, Vol. 22, page 112, para. 191; Per Cozens- Hardy, M.R. at page 547 and Per Fletcher Moulton, L.J. at page 549 in Simmons v. Heath Laundry Company (supra). It is equally well settled that the decision of the Tribunal on a question of fact which it has jurisdiction to determine is not liable to be questioned in proceedings under Art. 226 of the Constitution unless at the least it is shown to be fully unsupported by evidence."

12. Such point, in our view, has no manner of application in the instant case. It is not a case whether the MERI Mess employees are the employees under the Universities. However, it appears that the Executive Council has a pervasive and direct control in relation to their service condition and the Resolution was taken in this regard determining the fate of those employees by extending the benefit of Seventh Central Pay Commission. The moment the Executive Council has extended the benefit of the Seventh Central Pay Commission, it is too late in a day to contend that the said MERI Mess employees are not under the pervasive control of the University.
13. So far as the other judgment relied upon by the appellant in case of G.C. Mandawar (supra) is concerned, we do not find any incongruity or dissent to the proposition that providing the dearness allowance is primarily the discretion of an employer because of the concept of dearness allowance known under the common law.
14. We do not want to dilate much into the aforesaid aspect for the simple reason that there is no case made out in the instant matter that on extending the recommendation of the Seventh Central Pay

Commission, the DA component has not been extended to such employees. The concept of DA stands on a different footing than the concept of HRA extended to the employees. Once the HRA becomes an integral part of the condition of service, its revision depend upon the decision of the employer and once the employer has accepted the recommendation of the Seventh Central Pay Commission, the HRA is required to be revised in terms of such recommendation.

Page | 6

15. In whatever angle we looked at, we do not find any illegality and/or infirmity in the order impugned.
16. The appeal being **FMA 1046 of 2022** and the connected application being **CAN 1 of 2022** are **dismissed**. No order as to costs.
17. Urgent Photostat Certified copy of this order be given to the parties, if applied for, within three days of such application.

(Harish Tandon, J.)

(Prasenjit Biswas, J)