



2024:DHC:8453-DB



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

% ***Judgment delivered on: 24.10.2024***

+ **LPA 675/2013**

SANJAY KHER & ORS

.....Appellants

Through: Mr. Piyush Sharma, Mr.
Shivam Dubey and Mr. Anuj
Kumar Sharma, Advocates.

versus

UNION OF INDIA & ANR

.....Respondents

Through: Mr.Paritosh Budhiraja, Ms.
Larika Khandelwal, Ms. Divya
Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. This Letters Patent Appeal is directed against the judgment rendered by the learned Single Judge dated 09 April 2013 in terms of which the writ petition preferred by the appellants came to be dismissed.

2. We take note of the reliefs which were principally claimed in the writ petition and which read as follows: -

- “(A) allow this writ petition of the Petitioners with costs;
- (B) issue appropriate writ or writs, direction or directions, order or

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orders

(i) declaring the Petitioners entitled to the foreign allowance for the period they worked in Iraq at the same revised rates as were paid to the Non-IFS officers and staff of Ministry of External Affairs posted in Iraq with "all consequential benefits, like payment of arrears of foreign allowance along with interest @ 18% per annum for the period of delay committed by the respondents since 1990 with all consequential benefits.

(ii) directing the respondents to revise upwards the rate of foreign allowance, admissible to Petitioners, at least w.e.f. 1.1.86, in line with and at the same rate(s) of foreign allowance as paid to the Non-IFS officers and staff of the Ministry of External Affairs posted in Iraq during the same period(s) and make the payment of arrears of foreign allowance to the Petitioners due to such revision along with interest @ 18% per annum for the period of delay committed by the respondents since 1990 with all consequential benefits.

(iii) direct the respondents to pay cost of the petition.

(iv) issue such other and further writ or writs, direction or directions, order or orders or in the nature of mandamus as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

3. The principal grievance of the appellants was a purported failure on the part of the respondents to revise the foreign allowances which were payable to its employees while serving and discharging duties overseas and the same not being kept abreast with the various provisions which the Union Government came to impose in respect to non-**Indian Foreign Services**¹ officers. It was further submitted that although **Dearness Allowance**² had been revised from time to time, no corresponding exercise in respect of foreign allowances was undertaken. It was in the aforesaid light that the appellants approached this Court. For the purposes of disposal of the present

¹ IFS

² DA



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appeal, it would be apposite to take note of the following undisputed facts.

4. The appellants are stated to be employed in the Rashtriya Pariyojna Nirman Nigam Limited, a public sector undertaking, and who in the course of their employment came to be posted in Iraq. The learned Single Judge has noted that the petitioners had claimed that foreign allowances which were granted to them were liable to be revised from time to time and to be thus kept in step with the increase in the DA granted to employees in India as well as the upward revision of foreign allowances in respect of non-IFS officers of the Union Government.

5. From the appeal, we find that the petitioners were posted overseas over a period of time details whereof appear in a table forming part of paragraph 4 and which reads as follows:-

“

Name	Period		Total Period
	From	To	
1. Mr. Sanjay Kher	01.01.86	01.01.86	3 years, , 5 months, & 13 days
2. Mr. Subrat Sasak	19.02.88	14.02.91	3 years & 5 days
3. Mr. A.K. Shalla	01.01.86	03.06.87	1 years, 5 months & 2 days

6. Undisputedly, the services of the petitioners, while posted at Iraq were governed by “**Rules relating to terms and conditions of**



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the regular employees posted abroad-Iraq³.” These rules and insofar as foreign allowances was concerned, contained the following provision:-

“5. Foreign Allowance: To compensate, for the higher cost of living, an employee of the Company serving outside India shall be granted a foreign allowance at such, rates and subject to such conditions as may be prescribed by the Company from time to time, provided that such allowance shall not exceed the rates of foreign allowance applicable to Non-IFS officers of the Government of India of the equivalent category, such rates being subject to 5% compulsory economy cut and slab deductions prescribed by the Government of India from time to time. The present rates are, however, enclosed as Annexure 'A'.”

7. The record would reflect that an issue appears to have arisen in respect of the revision of emoluments liable to be paid to officers belonging to Class-I and Class-II services and employed in different public sector enterprises.

8. A **High Powered Pay Committee⁴** appears to have been constituted by the Union Government to study all aspects and to submit its recommendations. Since the report so submitted was not acted upon, the association of employees appears to have approached the Supreme Court by way of writ petitions.

9. Those writ petitions as well as Transfer Cases ultimately came to be disposed of on 3 May 1990 with the Supreme Court framing directions for all public sector undertakings to bear in consideration the report of the HPCC and to revise pay scales and the structure of emoluments accordingly.

³ Rules

⁴ HPCC



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10. This becomes evident from the following directions which ultimately came to be framed:-

“(i) The scales of pay and dearness allowance as recommended in the Report will be extended to those employees who have been appointed with specific terms and conditions for grant of Central D.A. This will be equally applicable to the employees who by rules laid down by the public sector enterprises are being paid Central dearness allowance.

(ii) The employees appointed on or after January 1, 1989, will be governed by such pay-scales and allowances as may be decided by the Government in its discretion. Those appointed earlier 1010 with IDA pattern will continue to be governed in accordance with the terms and conditions of their appointment.

(iii) The pay revision for those employees in respect of whom the recommendations are hereby being directed, to be implemented hereafter, will take place only as and when similar changes are effected for the Central Government employees. These employees will, however, continue to enjoy the option to switch over to the IDA pattern of the scales of pay etc. on a voluntary basis.

(iv) The various recommendations made in the Report will be implemented with effect from the dates as follows. These dates, are broadly in conformity with those specified in the Report:”

11. Pursuant to the aforesaid order of the Supreme Court, the **National Projects Construction Corporation Limited⁵** issued an Office Order of 05 July 1990 seeking to implement the various recommendations which had been made by the HPPC. However, and insofar as the aspect of foreign allowance is concerned, in paragraph 3.3 it was observed as follows: -

“3.3 The question of revision of pay scale and foreign allowance admissible to employees posted in Iraq is under examination and a further communication will follow.”

12. Since the respondents failed to undertake a revision of pay scale

⁵ Corporation



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and foreign allowances admissible to employees posted in Iraq, the petitioners approached this Court by way of the writ petition in question.

13. The learned Single Judge has on a consideration of Rule 5 held that a prerogative writ for the purposes of commanding the respondents to revise scales of pay would be clearly unmerited bearing in mind the legal position as enunciated consistently by the Supreme Court.

14. This becomes apparent from a reading of paragraph 5 which is reproduced hereinbelow: -

“5. Before I proceed further in this case, it would be necessary to refer to the dictum of the Supreme Court in the case of Indian Drugs and Pharmaceuticals Ltd. vs. Workmen (2007) 1 sec 408 wherein the Supreme Court has categorically observed that Courts should not substitute itself for the executive so as to decide what should be the scales of pay which should be granted to its officers. The Supreme Court has cautioned against judicial activism inasmuch as the finances of an employer are considered by the employer so as to decide what should be the emoluments which should be granted to its employees. Paras 37 and 40 of the said judgment are relevant and the same read as under:-

"37. Creation and abolition of posts and regularization are purely executive functions vide P. U.Joshi v. Accountant General (2003) 2 sec 632: 2003 see (L&S) 191. Hence, the court cannot create a post where none exists. Also, we cannot issue any direction to absorb the respondents or continue them service, or pay them salaries of regular employees, as these are purely executive functions. This Court cannot arrogate to it's the powers of the executive or legislature. There is abroad separation of powers under the Constitution, and the judiciary, too, must know its limits.

40. The courts must, therefore, exercise judicial restraint, and not encroach into the executive or legislative domain. Orders for creation of posts, appointment on these posts, regularization, fixing pay scales, continuation in service, promotions, etc., are all executive or legislature functions, and



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it is highly improper for Judges to step into this sphere, except in a rare and exceptional case. The relevant case-law and philosophy of judicial restraint has been laid down by the Madras High Court in great detail Rama Muthuramalingam v. Dy. Supdt. Of Police AIR 2005 Mad 1 and we fully agree with the views expressed therein.””

15. The Learned Judge has thereafter proceeded to observe that in case the appellants were to be accorded parity with allowances payable to non-IFS officers of the Union Government, it would clearly be violative of Rule 5 itself. This finding rests on an interpretation of Rule 5 as rendered by the learned Single Judge bearing in mind the usage of expression, “will not exceed” as appearing in that Rule.

16. This becomes evident from a reading of paragraph 7, which is reproduced hereinbelow: -

“7. In the present case, I agree with the interpretation urged on behalf of respondent no.2/employer with respect to Rule 5, that this rule cannot be read to mean that the foreign allowances of the employees of the respondent. no.2 automatically have to be enhanced or are to be all the times equal to foreign allowances which are payable to Non-IFS officers of the Government of India. If I do so, it would amount to doing violence to the language of Rule-5 inasmuch as the rule categorically provides that if there have to be changes, circulars/orders will be issued by the respondent no.2 from time to time. The very first line of Rule 5 makes this position crystal clear. Also the expression "will not exceed" cannot be read to mean "will be equal to" for granting the petitioners at all points of time the same foreign allowances which are paid to the Non-IFS officers of the Government of India.”

17. The learned Single Judge has thereafter also taken into consideration the position of the appellants while posted in Iraq drawing salaries and emoluments far greater than those claimed by the employees of the respondent no.2 while posted in India.



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18. While dealing with these and other aspects, the learned Single Judge held as under:-

“9. A reading of the aforesaid letter shows that nowhere the respondent no.2 has used any language therein that at all points of time, the respondent no.2 will grant its employees who were posted in Iraq, the same foreign allowances as are paid to the Non-IFS officers of the Government of India. This letter refers to the fact that its rules are based upon the rules for Non-IFS officers and this language cannot mean that at all points of time the foreign allowances which are payable to the Non-IFS officers, will be equal to the foreign allowances to be paid to the employees of the respondent no.2 who are posted in Iraq. Surely Central Government employees form a different class, and every PSU depending upon its financial condition can always decide whether or not to adopt the rules of the Central Government or adopt them in variation or not at all adopt them as stated in the judgment of the Supreme Court in Indian Drugs and Pharmaceuticals Ltd.(supra). Courts have no powers to impose upon an employer-organization directions for fixing of monetary emoluments to its employees.

10. I may note that the monetary emoluments which are paid to officers of the respondent no.2, who are posted in Iraq, are otherwise considerably higher than those employees of the respondent no.2 who are posted in India, as per the arguments as urged before me by the counsel for the respondent no.2. Also, there was no confined bindingness upon the petitioners to necessarily continue in Iraq, and if the petitioners were allegedly feeling the pinch of any higher costs, they at any point of time could have requested for their posting back to India. Obviously, the petitioners never did this because surely, the emoluments with respect to their posting in Iraq were far better than the emoluments which were paid to the employees in India serving the respondent no.2. Therefore, I do not find petitioners, at this stage can claim any enhancements in the foreign allowances, much less in the absence of any circulars issued by the respondent no.2 in this regard.”

19. Before us the challenge as laid in the writ petition was reiterated with it being contended that the respondents never took a formal decision consequent to the promise that was held out and stood



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embodied in the Office Order of 05 July 1990. It was submitted that, in fact, a new case was set up in the counter affidavit with it being contended that the Office Order of 05 July 1990 were to be applicable only in respect of employees who are posted in India. It was submitted that although pay scales, DA and other allowances were duly revised pursuant to the recommendations of the HPPC, the respondents clearly failed to undertake an identical exercise insofar as foreign allowances was concerned.

20. Having noted the submissions which were addressed before us on this appeal as well as the record of the proceedings as captured by the learned Single Judge in the judgment impugned, we find no ground to interfere with the view as expressed or the construction liable to be accorded to Rule 5.

21. As is apparent from a close reading of Rule 5, the employees of respondent no.2 while serving overseas were entitled to a foreign allowance payable at such rates and subject to such conditions as were to be prescribed by the respondent from time to time. The Proviso to Rule 5 in unambiguous terms provided that those allowances would not exceed the rates of foreign allowances applicable to non-IFS officers.

22. The Rule thus is clearly not demonstrative of an intent to accord parity in respect of foreign allowances payable to employees of the respondent and those that were being drawn by the other officers of the Union Government. The usage of the expression, “shall not exceed” was clearly indicative of the intent of the framers to prescribe



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a benchmark which would not be liable to be exceeded in any circumstance. Since the rule itself used the aforementioned expression, the submission of parity was clearly misconceived.

23. We are further of the opinion that Rule 5 did not create any interplay or interdependence between foreign allowances and DA. All that was prescribed was that the foreign allowance would be payable at such rates and would be subject to such conditions as were to be prescribed by the respondent-Corporation from time to time.

24. That then takes us to the principal question of whether a prerogative writ could have been issued commanding the respondent to necessarily revise the foreign allowance and which was an aspect which was alluded to even in the Office Order of 05 July 1990.

25. In our considered opinion, the learned Single Judge has correctly recognized the legal position which endures in this respect while rendering observations in paragraph 5 of the judgment. It is by now well settled, that the pay structure and allowances that are liable to be claimed by employees or officers is a matter clearly beyond the ken of the power of judicial review that stands conferred by Article 226 of the Constitution. It is ultimately for the employer bearing in mind all relevant factors to create a pay and remuneration structure as may be considered appropriate and expedient. The Court while invoking its powers under Article 226 of the Constitution would clearly not be justified in undertaking such an exercise.

26. We in this regard take into consideration the decision of the Supreme in **Union of India vs. Indian Navy Civilian Design**



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Officers Association and Another⁶, where the legal position was enunciated as follows: -

“9. Before advertng to the rival contentions raised by the learned counsels for the parties, it deserves to be noted that the power of judicial review of the High Courts in the matter of classification of posts and determination of pay scale is no more *res integra*. It has been consistently held by this Court in plethora of decisions that equation of posts and equation of salaries is a complex matter which is best left to an expert body unless there is cogent material on record to come to a firm conclusion that a grave error had crept in while fixing the pay scale for a given post and the interference of the Court was absolutely necessary to undo the injustice.

10. In *State of U.P. v. J.P. Chaurasia¹*, while answering the questions as to whether the Bench Secretaries in the High Court of Allahabad were entitled to pay scale admissible to the Section Officers and whether the creation of two grades with different scales in the cadre of Bench Secretaries who were doing the same and similar work was violative of the right to have “equal pay for equal work”. This Court observed as under:—

“18. The first question regarding entitlement to the pay scale admissible to Section Officers should not detain us longer. The answer to the question depends upon several factors. It does not just depend upon either the nature of work or volume of work done by Bench Secretaries. Primarily it requires among others, evaluation of duties and responsibilities of the respective posts. More often functions of two posts may appear to be the same or similar, but there may be difference in degrees in the performance. The quantity of work may be the same, but quality may be different that cannot be determined by relying upon averments in affidavits of interested parties. The equation of posts or equation of pay must be left to the executive Government. It must be determined by expert bodies like Pay Commission. They would be the best judge to evaluate the nature of duties and responsibilities of posts. If there is any such determination by a Commission or Committee, the court should normally accept it. The court should not try to tinker with such

⁶ 2023 SCC OnLine SC 173



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equivalence unless it is shown that it was made with extraneous consideration.”

11. The afore-stated ratio was followed by this Court in *Union of India v. Makhan Chandra Roy*². Again, in *Secretary, Finance Department v. West Bengal Registration Service Association*³, the claim of Sub-Registrars of West Bengal Registration Service claiming parity in pay scale with Munsiffs on the basis that Sub-Registrars were conferred gazetted status, was examined by this Court. It was elaborately observed in para 12 as under:—

“12. We do not consider it necessary to traverse the case law on which reliance has been placed by counsel for the appellants as it is well settled that equation of posts and determination of pay scales is the primary function of the executive and not the judiciary and, therefore, ordinarily courts will not enter upon the task of job evaluation which is generally left to expert bodies like the Pay Commissions, etc. But that is not to say that the Court has no jurisdiction and the aggrieved employees have no remedy if they are unjustly treated by arbitrary State action or inaction. Courts must, however, realise that job evaluation is both a difficult and time-consuming task which even expert bodies having the assistance of staff with requisite expertise have found difficult to undertake sometimes on account of want of relevant data and scales for evaluating performances of different groups of employees. This would call for a constant study of the external comparisons and internal relativities on account of the changing nature of job requirements. The factors which may have to be kept in view for job evaluation may include (i) the work programme of his department (ii) the nature of contribution expected of him (iii) the extent of his responsibility and accountability in the discharge of his diverse duties and functions (iv) the extent and nature of freedoms/limitations available or imposed on him in the discharge of his duties (v) the extent of powers vested in him (vi) the extent of his dependence on superiors for the exercise of his powers (vii) the need to co-ordinate with other departments, etc. We have also referred to the history of the service and the effort of various bodies to reduce the total number of pay scales to a reasonable number. Such reduction in the number of pay scales has to be achieved by resorting to broad banding of posts by



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placing different posts having comparable job charts in a common scale. Substantial reduction in the number of pay scales must inevitably lead to clubbing of posts and grades which were earlier different and unequal. While doing so care must be taken to ensure that such rationalisation of the pay structure does not throw up anomalies. Ordinarily a pay structure is evolved keeping in mind several factors, e.g., (i) method of recruitment, (ii) level at which recruitment is made, (iii) the hierarchy of service in a given cadre, (iv) minimum educational/technical qualifications required, (v.) avenues of promotion, (vi) the nature of duties and responsibilities, (vii) the horizontal and vertical relativities with similar jobs, (viii) public dealings, (ix) satisfaction level, (x) employer's capacity to pay, etc. We have referred to these matters in some detail only to emphasise that several factors have to be kept in view while evolving a pay structure and the horizontal and vertical relativities have to be carefully balanced keeping in mind the hierarchical arrangements, avenues for promotion, etc. Such a carefully evolved pay structure ought not to be ordinarily disturbed as it may upset the balance and cause avoidable ripples in other cadres as well. It is presumably for this reason that the Judicial Secretary who had strongly recommended a substantial hike in the salary of the Sub-Registrars to the Second (State) Pay Commission found it difficult to concede the demand made by the Registration Service before him in his capacity as the Chairman of the Third (State) Pay Commission. There can, therefore, be no doubt that equation of posts and equation of salaries is a complex matter which is best left to an expert body unless there is cogent material on record to come to a firm conclusion that a grave error had crept in while fixing the pay scale for a given post and Court's interference is absolutely necessary to undo the injustice.”

12. In *State of Haryana v. Charanjit Singh*⁴, a three-judge Bench in a referred matter considered whether the doctrine of “equal pay for equal work”, was an abstract doctrine, and observed thus:—

“**19.** Having considered the authorities and the submissions we are of the view that the authorities in the cases of *Jasmer Singh*[(1996) 11 SCC 77 : 1997 SCC (L&S) 210 : AIR 1997 SC 1788 : (1997) 2 LLJ 667], *Tilak*



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Raj [(2003) 6 SCC 123 : 2003 SCC (L&S) 828], *Orissa University of Agriculture & Technology* [(2003) 5 SCC 188 : 2003 SCC (L&S) 645 : (2003) 2 LLJ 968] and *Tarun K. Roy* [(2004) 1 SCC 347 : 2004 SCC (L&S) 225] lay down the correct law. Undoubtedly, the doctrine of “equal pay for equal work” is not an abstract doctrine and is capable of being enforced in a court of law. But equal pay must be for equal work of equal value. The principle of “equal pay for equal work” has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in administration. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is also an acceptable reason for pay differentiation. The very fact that the person has not gone through the process of recruitment may itself, in certain cases, make a difference. If the educational qualifications are different, then also the doctrine may have no application. Even though persons may do the same work, their quality of work may differ. Where persons are selected by a Selection Committee on the basis of merit with due regard to seniority a higher pay scale granted to such persons who are evaluated by the competent authority cannot be challenged. A classification based on difference in educational qualifications justifies a difference in pay scales. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of “equal pay for equal work” requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities make a difference. Thus



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normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ court can lightly interfere. Normally a party claiming equal pay for equal work should be required to raise a dispute in this regard. In any event, the party who claims equal pay for equal work has to make necessary averments and prove that all things are equal. Thus, before any direction can be issued by a court, the court must first see that there are necessary averments and there is a proof. If the High Court is, on basis of material placed before it, convinced that there was equal work of equal quality and all other relevant factors are fulfilled it may direct payment of equal pay from the date of the filing of the respective writ petition. In all these cases, we find that the High Court has blindly proceeded on the basis that the doctrine of equal pay for equal work applies without examining any relevant factors.”

13. In *Union of India through Secretary, Department of Personnel, Public Grievances and Pensions v. T.V.L.N Mallikarjuna Rao*⁵, this Court reiterated the said position:—

“**26.** The classification of posts and determination of pay structure comes within the exclusive domain of the executive and the Tribunal cannot sit in appeal over the wisdom of the executive in prescribing certain pay structure and grade in a particular service. There may be more grades than one in a particular service.”

14. In view of the afore-stated legal position, it clearly emerges that though the doctrine “equal pay for equal work” is not an abstract doctrine and is capable of being enforced in a Court of Law, the equal pay must be for equal work of equal value. The equation of posts and determination of pay scales is the primary function of the Executive and not of the Judiciary. The Courts therefore should not enter upon the task of job evaluation which is generally left to the expert bodies like the Pay Commissions which undertake rigorous exercise for job evaluation after taking into consideration several factors like the nature of work, the duties, accountability and responsibilities attached to the posts, the extent of powers conferred on the persons holding a particular post, the promotional avenues, the Statutory rules governing the conditions of service, the horizontal and vertical relativities with similar jobs etc. It may be true that the nature of work involved in two posts may



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sometimes appear to be more or less similar, however, if the classification of posts and determination of pay scale have reasonable nexus with the objective or purpose sought to be achieved, namely, the efficiency in the administration, the Pay Commissions would be justified in recommending and the State would be justified in prescribing different pay scales for the seemingly similar posts. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues or frustration due to longer duration of promotional avenues is also an acceptable reason for pay differentiation. It is also a well-accepted position that there could be more than one grade in a particular service. The classification of posts and the determination of pay structure, thus falls within the exclusive domain of the Executive, and the Courts or Tribunals cannot sit in appeal over the wisdom of the Executive in prescribing certain pay structure and grade in a particular service.”

27. On an overall conspectus of the above, we find no justification to interfere with the judgment rendered.

28. The appeal fails and shall stand dismissed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

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Signature Not Verified

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