

CASE NO.:
Appeal (civil) 6519 of 1999

PETITIONER:
Union of India and Anr.

RESPONDENT:
Manu Dev Arya

DATE OF JUDGMENT: 27/04/2004

BENCH:
CJI, S.B. Sinha & S.H. Kapadia.

JUDGMENT:
J U D G M E N T

S.B. SINHA, :

This appeal is directed against a judgment and order dated 07.08.1998 passed by a Division Bench of the Gauhati High Court, in Writ Appeal No.6 of 1998 whereby and whereunder it refused to interfere with the judgment and order passed by a learned Single Judge of the said Court allowing a writ petition filed by the respondent herein.

The respondent was appointed as Research Assistant (H) with the Central Council for Research in Homeopathy on or about 28.09.1987 in the pre-revised pay scale of Rs.425-700/- (revised 1400-2300/-). He had been getting Non-Practicing Allowance (NPA) at the rate of Rs.75/- in the pre-revised scale of pay. The doctors and physicians, however, were getting Non-Practicing Allowance in the pre-revised pay scale at the rate of Rs.150/-. Non-Practicing Allowance of the doctors and physicians in the pay scale of Rs.2000-3500/- was revised with effect from 1.1.1986 in terms of an order of the Government of India dated 27.02.1991. A representation was made by the respondent claiming the enhanced rate of Non-Practicing Allowance which was not allowed. A writ petition thereafter was filed by the respondent herein before the High Court praying for issuance of a writ of or in the nature of mandamus directing the appellant herein to pay Non-Practicing Allowance at the enhanced rate which should be commensurate to the revision in the Non-Practicing Allowance paid to the doctors and physicians.

The learned Single Judge of the High Court formulated a question for his determination as to whether the respondent herein had been made victim of hostile discrimination by the appellant by reason of non grant of any enhancement on the Non-Practicing Allowance. Applying the principles laid down in Articles 14 and 39(d) of the Constitution of India, the learned Single Judge held that the doctors and physicians on the one hand and the Research Officers in Homeopathic department, on the other, cannot be treated differently and thus, the appellants must be held to have made hostile discrimination without there being any reasonable ground for making a differential treatment in the matter of enhancement of Non-Practicing Allowance payable to the respondent.

The said judgment of the learned Single Judge on appeal preferred by the appellants herein was summarily dismissed by a non-speaking order by a Division Bench of the High

Court.

Mr. A.K. Panda, learned Senior Counsel appearing on behalf of the appellants, would submit that the High Court committed a serious error in invoking the doctrine of equal pay for equal work and thereby interfered with the policy decision of the Central Government in fixing the Non-Practicing Allowance for different categories of employees.

It is not in dispute that the Government of India laid down a policy decision as regard grant of Non-Practicing Allowance in terms of its letter dated 27.02.1991 addressed to the Director, Central Council for Research in Ayurveda, Sidda, stating :

" I am directed to invite a reference to this Ministry's letter No.28015/21/780 AY .Desk ISM Vol. I Part I dated 10th Dec 1981 on the subject mentioned above and I say that the question regarding continuation of Non-Practicing Allowance (NPA) or revision of its rates in the context of the revised scales of pay effective from 1.1.1986 has been under consideration of the Government some time past. It has now been decided that the ISM & H. Physicians in the scale of Rs.2000-3500/- and above may be allowed Non-Practicing Allowance at the rate and from the dates indicated below :

Pay
range in
the
revised
scale
Rate of NPA from
1.1.96 from the
date of option for
revised scale of
pay whichever is
later.

A.

- i)
Basic pay from
Rs.2000 to 2999/-
Rs.600/-
- ii)
Basic pay from
Rs.3000 to 3699/-
Rs.800/-
- iii)
Basic pay from
Rs.3700 to above
Rs.900/-

With
effect
from

1.10.1997

i)

Basic pay from 2000
to 2999/-
Rs.600/-

ii)

Basic pay from
Rs.3000 to 3699/-
Rs.850/-

iii)

Basic pay from
Rs.3700 to 5900/-
Rs.950/-

iv)

Basic pay from
Rs.6000 and above
Rs.1000/-

2. No Non-practicing allowance will be admissible to the holders of posts in scale of pay lower than Rs.2000-3500. However, to protect the existing incumbents who are already in receipt of HPA, Non-Practicing Allowance may be continued with reference to the rates relate to notional pay in the pre-revised scales as indicated in this Ministry's letter dated 19.12.1981.

3. While extending Non-Practicing Allowance to the employees it may be ensured that they have not been allowed private practice. Such employees may be allowed Non-Practicing Allowance from the date such orders, if any, issued are withdrawn."

The State in exercise of its power conferred upon it under the proviso appended to Article 309 of the Constitution of India is entitled to fix the conditions of service of its employees. In absence of any rule framed in this behalf, such conditions of service can be fixed by reason of an executive instruction. From a perusal of para 2 of the said letter dated 27.2.1991, it would appear that no Non-Practicing Allowance was to be paid to the holders of posts in the scale of pay lower than Rs.2000-3500/-. However, in the case of the existing incumbents who had been receiving Non-Practicing Allowance, the same was directed to be continued.

We fail to see as to how the doctrine of equal pay for equal work could be invoked in a case of this nature. The doctors and physicians, who were appointed on the Allopathic side and were drawing a higher scale of pay, could be treated differently. Only because at one point of time the Research Assistant and the Doctors had been given the benefit of Non-Practicing Allowance, the same by itself would not mean that a discrimination has been meted out. The respondent was employed as Research Assistant and was getting Non-Practicing at the rate of Rs.75/- per month on the pay scale of Rs.1400-2300/-. The doctors and the physicians, however, were on the pay scale of Rs.2000-3500/-

and had been getting Non-Practicing Allowance at the rate of Rs.150/- per month. Subsequently, if without causing any financial loss to the incumbents of the other branch of employees and having regard to the fact that they form a class by themselves, a higher amount of Non-Practicing Allowance is granted to the Doctors and Physicians, the same by itself, in our considered opinion, would not lead to an unequal treatment.

A policy decision of the State unless affects somebody's legal right cannot be questioned. The question is as to whether certain allowances would be paid to a section of employees or not and that too at what rate is basically a question of policy. The concerned employees cannot claim Non-Practicing Allowance as a matter of right.

A similar question came up for consideration before this Court in Joint Action Council of Service Doctors' Organisations and Others vs. Union of India and Another [(1996) 7 SCC 256], wherein it was held :

"According to us, the present is basically a question of policy and the claim in this regard is not founded on any right as such. Insofar as the policy is concerned, there may be some justification for excluding the non-practicing allowance for the purpose at hand because this allowance is seemingly not paid to all the Service Doctors. So, if this allowance is included for the purpose at hand, the same may be disadvantageous even to some Service Doctors. We do not say more than this as this matter is presently under examination of the Vth Pay Commission."

It is further trite that although a discrimination can be inferred in relation to certain types of allowances but Non-Practicing Allowance would stand on a somewhat different footing. [See Dr. Ms. O.Z. Hussain vs. Union of India - 1990 (Supp.) SCC 688].

For the reasons aforementioned, we are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed. However, as nobody has appeared on behalf of the respondent, there shall be no order as to costs.