

Umesh Kumar Moza Vs. Govt. of J and K and anr

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Court : Delhi

Decided On : Oct-31-2014

Judge : Hima Kohli

Appellant : Umesh Kumar Moza

Respondent : Govt. of J and K and anr

Advocate for Def. : Mr. Suhail Malik

Advocate for Pet/Ap. : Mr. B.L. Wali

Judgement :

* + IN THE HIGH COURT OF DELHI AT NEW DELHI W.P.(C) 1104/2013, 2874/2013 and 2884/2013 Date of decision:

31. 10.2014 s IN THE MATTER OF: UMESH KUMAR MOZA ASHOK KUMAR DHAR ROOP KISHAN KAUL Petitioner Petitioner Petitioner Through: Mr. B.L. Wali, Advocate versus GOVT. OF J & K AND ANR. Respondents Through: Mr. Suhail Malik, Advocate CORAM HON'BLE MS.JUSTICE HIMA KOHLI HIMA KOHLI, J.

(Oral) 1. By this common judgment, the Court proposes to decide all the three connected cases, as the facts are quite similar and the grievance raised by the petitioners are identical. For the purpose of ready reference, the facts mentioned in WP(C) No.1104/2013 are being referred to.

2. The petitioner in W.P.(C) 1104/2013 has sought directions to the respondent No.1/Government of Jammu & Kashmir and the respondent No.2/ Department of Health & Medical Education, Government of Jammu & Kashmir (hereinafter referred to as the Department) to amend the Government Order dated 18.7.2011 (Annexure P-9) and grant him the benefits of the Third Time Bound Promotion monetarily w.e.f. 1.4.2003, as was extended to other similarly placed doctors working in the Department.

3. The relevant facts of the aforesaid case are that the petitioner had qualified his MBBS examination on 22.7.1981 and completed his house job from Shri Maharaja Hari Singh Hospital, Srinagar, Kashmir in the year 1981-82. On 7.1.1983, he was appointed as an Assistant Surgeon at Sher-i-Kashmir Institute of Medical Sciences, Soura, Srinagar, Kashmir. On 2.7.1986, the petitioner completed his Masters Degree and in August, 1989, he completed his Senior Residency tenure whereafter he was directed to join his parent department, i.e., Directorate of Health Services in the month of September, 1989 and was posted at Sub-District Hospital, Handwara, Kashmir. In February, 1990, fearing for his life and that of his family members due to the unrest in the State of Kashmir, the petitioner had left the Valley and migrated to Jammu but he was not granted any posting there. However, the petitioner continued drawing his salary from the Office of the Directorate of Health Services, Jammu.

4. On 22.7.1988, the respondents issued the following Govt. Order:

Government of Jammu and Kashmir Health and Medical Education Department
Subject:- (i) Scheme of time-bound promotions for the doctors in the Health Services Department. (ii) Enhancement in the rates of NPA. Reference:- Cabinet Decision No.:

116. dated :

20. 7.1988 Government Order No.595 HME of 1988 Dated :

22. 7.1988 Sanction is hereby accorded to the introduction of a scheme of Time Bound Promotion for doctors in the Health Services Department (including Dental

Surgeons/ Specialists), as detailed in the Annexure, subject to the following conditions: (i) The cut off date for computation of the number of years for purposes of the aforesaid scheme shall be March 31 1988, to begin with, and March 31 each year for future. (ii) In such computation the number of years spent by a doctor on a particular post, in adhoc capacity, except at the entry level, shall also be taken into account; (iii) The benefit of time-bound promotion shall be applicable only if the AIRs of the doctor concerned for the last 3 years show no adverse comment; (iv) The scheme shall not have any bearing on inter-se seniority of doctors in a particular class/category/scale and an undertaking to the effect that no such claim shall accrue as a result of the scheme shall be obtained by the concerned Heads of Department/Institution from each beneficiary. Sanction is further accorded to enforcement of the following pattern of non-practising allowance for such of the doctors as are entitled to this allowance under rules; with immediate effect: Pay 1. Below `3000/- P.M.

2. `3000/- and below `3700/3. `3700/- and above W.P.(C) 1104/2013, 2874/2013 & 2884/2013 Rate `500/- P.M. `600/- P.M. By order of the Government of Jammu and Kashmir. Sd/(H.L. Kadlabju) IAS, Commissioner/Secretary to Government Health and Medical Education Department

5. Following the aforesaid Government Order, a Circular dated 3.3.1994 was issued by the respondent No.2/Department granting the pay-scale of `3000-4500/- to seven doctors, who were working in the pay-scale of `2200-4000/- and further clarifying inter alia that grant of the pay-scale would not affect their inter se seniority. On 12.12.1995, the Relief Commissioner (M), Jammu addressed a letter to the Director, Health Services, Jammu informing him that the petitioner herein and another doctor by the name of Dr. Kanwal Sadhu, had approached him with a request that their leave salary be issued at Delhi, and that both the doctors were registered as migrants at the concerned office and the office of the Relief Commissioner did not have any objection to the leave salary being drawn in their favour by the Resident Commissioner, Delhi, subject to the condition that the Director of Health Services, Jammu did not require their services at Jammu for migrants or otherwise.

6. It is submitted by Mr. B.L. Wali, learned counsel for the petitioner that after issuance of the aforesaid no-objection by the office of the Relief Commissioner (M), Jammu, the petitioner has been drawing his monthly salary from the Office of the Resident Commissioner, Jammu & Kashmir House, New Delhi ever since the year 1996, till he had superannuated on 28.4.2013, an event that took place during the pendency of the present petition.

7. In the meantime, vide order dated 20.12.2002, the Government of Jammu & Kashmir granted the First Time Bound Promotion to the petitioner w.e.f. 1.4.1990, in the pay-scale of `2350-4040 (prerevised) and the Second Time Bound Promotion w.e.f. 1.4.1998, in the pay-scale of `2700-4250/- (pre-revised). Subsequently, on 18.7.2011, the respondents granted the Third Time Bound Promotion to the petitioner in the pay-scale of `4100-5300/- (pre-revised) w.e.f. 1.4.2003 notionally and w.e.f. 1.4.2011 monetarily. Aggrieved by the said decision taken by the respondents to grant the Third Time Bound Promotion to the petitioner notionally w.e.f. 1.4.2003, he has filed the present petition.

8. Mr. Wali, learned counsel for the petitioner draws a comparison between the petitioner and a similarly placed doctor, namely, Dr. Vinod Kumar Bhat, who was granted the Second and the Third Time Bound Promotions by the respondents, vide order dated 9.7.2010, without placing any rider in the said order or granting the same notionally for any period, whereas in the case of the petitioner, the Third Time Bound Promotion has been granted to him w.e.f. 1.4.1993, but only notionally. As a consequence, the petitioner has been deprived of the benefits flowing under the Third Time Bound Promotion for a period stretching over eight years, whereas in other cases, the respondents have not followed the same policy. To substantiate the aforesaid submission, learned counsel draws the attention of this Court to the order dated 9.7.2010 passed by the respondents in favour of Dr. Vinod Kumar Bhat, an Assistant Surgeon (Migrant) like the petitioner herein, who was accorded the Second Time Bound Promotion in the pay-scale of `2700-4250/- (prerevised) on 1.4.1994, and the Third Time Bound Promotion in the pay-scale of `4100-5300/- (pre-revised) w.e.f. 1.4.1999 (Annexure P8).

9. Learned counsel for the petitioner states that aggrieved by the aforesaid arbitrary and unjustified action of the respondents, the petitioner had submitted a number of representations to them seeking amendment of the impugned order dated 18.7.2011, but to no avail. It is contended that though the case of the petitioner is no different from that of Dr. Vinod Kumar Bhat, but the respondents have chosen to treat him differently without any justification. He submits that unlike Dr. Vinod Kumar Bhat, who was granted the Third Time Bound Promotion monetarily for a period relating back to eleven years, reckoned from 09.07.2010, the date when the said benefit was accorded to him. In the case of the petitioner, by virtue of the impugned order, the said benefit was extended to him notionally only w.e.f. 1.4.2003 and monetarily w.e.f. 1.4.2011, thus causing him a great monetary loss.

10. Counter affidavits in opposition to the present petition have been filed by the respondents. One of the preliminary objections taken by the respondents is with regard to the maintainability of the present petition in this Court on the ground of lack of territorial jurisdiction.

11. Mr. Malik, learned counsel for the respondents, submits that this Court is not vested with the territorial jurisdiction to entertain the present petition in view of the fact that the petitioner is an employee of the State of Jammu & Kashmir, he was working as an Assistant Surgeon at Srinagar and his salaries were being released by the State of Jammu & Kashmir at Srinagar. He further states that the Department of Health & Medical Education is also situated at Jammu, which is the seat of the Government, and therefore the petitioner ought to have approached the High Court of Jammu & Kashmir for appropriate relief. He argues that merely because the salaries were being disbursed by the respondents from the Office of the Resident Commissioner, Jammu & Kashmir W.P.(C) 1104/2013, 2874/2013 & 2884/2013 House, New Delhi the convenience of the petitioner, would not vest territorial jurisdiction on this Court.

12. On merits, learned counsel for the respondents seeks to justify the notional benefit extended to the petitioners under the Third Time Bound Promotion by relying upon Rule 2.43 of the J & K Financial Code Volume-I, which stipulates as

under :

2-43. The re-opening of old cases should be deprecated as a fundamental principle. Where, however, such cases are opened as a special case as for instance in relation to the refixation of initial pay in time scale, the arrears should not be allowed.

1. Explanations deleted. Government Instructions. - A question has arisen as to what should be the determining factor for treating a case to be an Old One for purposes of rule 2-43. It has been decided that a case which has been under correspondence throughout and in which the question of payment arises only when it is decided and final orders passed thereon, will not attract the provisions of rule 2-43. In such cases the payment of arrears if any, due may be paid retrospectively provided that the competent authority who has issued final orders on the disposal of the case specifically mentions the date from which the arrears due as a result of retrospective sanction are to be paid and also records briefly the reasons for payment of such arrears. Such sanction shall not be issued by the competent authority without the previous consent of the Finance Department and in case of disagreement by the Finance Department with the approval of the Cabinet. Cases may arise where a claim for payment is taken up suddenly after a considerable period, either because the claim was lost sight of before or because the circumstances under which it was withheld and the relevant orders in force at the time to which it pertains are stated to have escaped notice at that time. Such like cases shall be treated as Old Cases for purposes of rule 2-43 and their re-opening shall be deprecated. Provided that if any such case affects the future emoluments of an official the case will be re-opened and the pay refixed retrospectively but without payment, of arrears up to the date of refixation.

13. Learned counsel for the respondents states that the aforesaid Rule prescribes that cases where a claim for payment is taken up suddenly after a considerable period of time, either because the said claim was lost sight of before or because the circumstances under which it was withheld and the relevant orders in force at the time to which it pertains had escaped notice at that point in time, would have to be treated as old cases as explained under Rule 2.43 and such cases ought not to

be reopened. It is submitted that the present case is an old case as defined under Rule 2.43 of the J&K Financial Code Volume-I and therefore the same ought not to be re-opened for granting any monetary benefit to the petitioner.

14. The Court has heard the arguments advanced by the counsels for the parties and considered the averments made in the pleadings and the documents enclosed therewith.

15. As regards the first objection with regard to territorial jurisdiction taken by the counsel for the Respondent, it is necessary to refer to Article 226 of the Constitution of India. Clause (2) of Article 226 of the Constitution of India prescribes that the power conferred under clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. For the interpretation of Article 226(2), this Court may usefully refer to a decision of the Supreme Court in the case of Oil and Natural Gas Commission Vs Utpal Kumar Basu reported as (1994) 4 SCC711 wherein, while discussing Article 226(2) of the Constitution of India, it was observed as below:

5. . Under Clause (2) of Article 226 the High court may exercise its power conferred by Clause (1) if the cause of action, wholly or in part, had arisen within the territory over which it exercises jurisdiction, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. On a plain reading of the aforesaid two clauses of Article 226 of the Constitution it becomes clear that a High Court can exercise the power to issue directions, orders or writs for the enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose if the cause of action, wholly or in part, had arisen within the territories in relation to which it exercises jurisdiction, notwithstanding that the seat of the Government or authority or the residence of the person against whom the direction, order or writ is issued is not within the said territories...

(emphasis added) 16. The aforesaid decision was taken note of by the Supreme Court in the case of Union of India Vs. Adani Exports reported as (2002) 1 SCC567 and it held as follows:

17. It is seen from the above that in order to confer jurisdiction on a High Court to entertain a writ petition or a special civil application as in this case, the High Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts do constitute a cause so as to empower the court to decide a dispute which has, at least in part, arisen within its jurisdiction. It is clear from the above judgment that each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the lis that is involved in the case. Facts which have no bearing with the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned. (emphasis added) 17. In *Rajendran Chingaravelu v. R.K. Mishra, Additional Commissioner of Income Tax and Ors.* reported as (2010) 1 SCC457 while considering the scope of Article 226(2) of the Constitution, particularly the cause of action for maintaining a writ petition, the Supreme Court made the following observation:

9. ... The High Court did not examine whether any part of cause of action arose in Andhra Pradesh. Clause (2) of Article 226 makes it clear that the High Court exercising jurisdiction in relation to the territories within which the cause of action arises wholly or in part, will have jurisdiction. This would mean that even if a small fraction of the cause of action (that bundle of facts which gives a Petitioner, a right to sue) accrued within the territories of Andhra Pradesh, the High Court of that State will have jurisdiction.

18. In a recent decision, in the case of *Nawal Kishore Sharma Vs. Union of India* reported as 2014 (106) ALR710 when required to interpret the very same provisions, the Supreme Court referred to the aforesaid decisions and to some others on the same aspect and held as below:

11. On a plain reading of the amended provisions in Clause (2), it is clear that now High Court can issue a writ when the person or the authority against whom the writ is issued is located outside its territorial jurisdiction, if the cause of action wholly or partially arises within the court's territorial jurisdiction. Cause of action for the purpose of Article 226(2) of the Constitution, for all intent and purpose must be assigned the same meaning as envisaged Under Section 20(c) of the Code of Civil Procedure. The expression cause of action has not been defined either in the Code of Civil Procedure or the Constitution. Cause of action is bundle of facts which is necessary for the Plaintiff to prove in the suit before he can succeed. xxxxxxxxxxxx 19. Regard being had to the discussion made hereinabove, there cannot be any doubt that the question whether or not cause of action wholly or in part for filing a writ petition has arisen within the territorial limit of any High Court has to be decided in the light of the nature and character of the proceedings Under Article 226 of the Constitution. In order to maintain a writ petition, the Petitioner has to establish that a legal right claimed by him has been infringed by the Respondents within the territorial limit of the Court's jurisdiction.

19. Coming closer home to a decision of the Division Bench of this Court in the case of University of Kashmir, Srinagar & Anr. vs. H.L. Warikoo & Ors., reported as 132 (2006) DLT606(DB), cited by learned counsel for the petitioner, in the aforesaid case, which was also arising from a service matter, the University of Kashmir had filed an appeal against the judgment of the learned Single Judge, wherein the preliminary objection raised by the appellant therein as to the maintainability of the writ petition filed in this Court by the respondent No.1, who was a lecturer in the said University and had prayed for the release of his retiral benefits, was turned down with the observation that in circumstances where the respondent therein and other employees had fled the State of Jammu & Kashmir, apprehending danger to their lives and the State Government as also the University were conscious of the said reality and had provided for a mechanism whereunder, the salary and emoluments of the migrants/employees were being disbursed to the Resident Commissioner at Delhi, it could not be denied that a part of cause of action had arisen within the jurisdiction of the High Court of Delhi and as a result, the petition filed by the respondent was held to be maintainable.

20. The appellate court had agreed with the findings returned by the learned Single Judge on this aspect and had turned down the preliminary objection raised by the University of Kashmir as to the maintainability of the petition by observing that the respondent No.1 therein was compelled to reside in Delhi on account of the disturbed situation prevailing in the Kashmir Valley since August, 1990 and therefore, the question of denying him access to justice by raising an objection as to the maintainability of the writ petition on the ground of lack of territorial jurisdiction of the High Court of Delhi, was without merits.

21. The facts pleaded by the petitioner in the instant case reveals that he has been residing in Delhi since the year 1993, and conscious of the circumstances which had led to the Petitioner and many others fleeing the Valley, the State Government had provided for a mechanism whereunder their salaries and emoluments were being disbursed through the Resident Commissioner, Jammu and Kashmir House, New Delhi.

22. Furthermore, the court has been informed that while still continuing to reside in Delhi along with his family, the petitioner has finally superannuated on 28.4.2013 and in all this duration, he was continuing to draw his salary from the Office of the Director Health Services, through the Office of the Resident Commissioner, Jammu & Kashmir House, New Delhi.

23. Given the averments made in the writ petition with regard to the cause of action, clause (2) of Article 226 of the Constitution of India, would come to the petitioners aid and resultantly, the question of territorial jurisdiction has to be decided in his favour. The respondents cannot legitimately contend that the present petition ought to be rejected as not being maintainable in this Court or that the petitioner ought to have approached the High Court in the State of Jammu & Kashmir for appropriate relief.

24. In this context, an equally important principle is that of forum conveniens which must be taken note of while examining the issue of cause of action. A Full Bench of this Court in the case of Sterling Agro Industries Ltd.v Union of India reported as AIR2011 Delhi 174 had interpreted the said concept in the following words:

31. The concept of forum convenience fundamentally means that it is obligatory on the part of the court to see the convenience of all the parties before it. The convenience in its ambit and sweep would include the existence of more appropriate forum, expenses involved, the law relating to the lis, verification of certain facts which are necessitous for just adjudication of the controversy and such other ancillary aspects. The balance of convenience is also to be taken note of. Be it noted, the Apex Court has clearly stated in the cases of *Kusum Ingots and Alloys Ltd. v. Union of India* (AIR 2004 SC2321, *Mosaraf Hossain Khan v. Bhagheeratha Engg. Ltd. and Ors.* (2006) 3 SCC658 and *Ambica Industries vs. Commissioner of Central Excise* (2007) 6 SCC769 about the applicability of the doctrine of forum convenience while opining that arising of a part of cause of action would entitle the High Court to entertain the writ petition as maintainable.

32. The principle of forum convenience in its ambit and sweep encapsulates the concept that a cause of action arising within the jurisdiction of the Court would not itself constitute to be the determining factor compelling the Court to entertain the matter. While exercising jurisdiction under Articles 226 and 227 of the Constitution of India, the Court cannot be totally oblivious of the concept of forum convenience. The Full Bench in *New India Assurance Co. Ltd.* (supra) has not kept in view the concept of forum convenience and has expressed the view that if the appellate authority who has passed the order is situated in Delhi, then the Delhi High Court should be treated as the forum convenience. We are unable to subscribe to the said view.

(emphasis added) 25. The Court is therefore of the opinion that the High Court is vested with territorial jurisdiction to entertain the present petition and the objection with regard to the maintainability of the writ petition, as raised by the counsel for the respondents, has to be turned down.

26. Even otherwise, where the petitioner had to leave his home State under very unusual circumstances so as to shift with bag and baggage for relocating himself with his family members to another part of the country, it would be a gross violation of his fundamental rights to deny him access to justice merely on the ground of lack of territorial jurisdiction.

27. The view of this Court finds resonance in the decisions of the Supreme Court in the cases of M.H. Hoskot vs. State of Maharashtra, reported as AIR 1978 SC1548 and Suk Das vs. Union Territory of Arunachal Pradesh, reported as AIR 1986 SC991 wherein it was declared that the right of access to justice is integral to the fundamental right to life and liberty guaranteed under Article 21 of the Constitution of India.

28. As for the merits of the case, a perusal of the order dated 9.7.2010 passed in favour of Dr. Vinod Kumar Bhat granting him the Second and the Third Time Bound Promotions w.e.f. 1.4.1994 and 1.4.1999 respectively, reveals that without any justification, a different yardstick has been applied by the respondent to the petitioner for the very same relief while issuing the impugned order dated 18.7.2011, whereunder he was granted the notional pay-scale of `4100-5300/- (pre-revised) w.e.f. 1.4.2003, but was not given the monetary benefits thereunder and w.e.f. 1.4.2011, when the said pay-scale was granted to him monetarily. In other words, only the amount payable w.e.f. 1.4.2011 was ordered to be released in favour of the petitioner while depriving him of the monetary benefit of the upgraded pay scale for a period of eight years reckoned from 01.04.2003. No rationale has been offered for dividing the Third Time Bound Promotion granted to the petitioner in two parts at the time of issuing the impugned order; nor is there any justification for doing so when a similarly placed Assistant Surgeon employed with the respondent, namely, Dr. Vinod Kumar Bhat was granted real time benefits of the Time Bound Promotions.

29. The plea of the learned counsel for the respondents that Rule 2.43 of the J&K Financial Code Volume-I prohibits re-opening of old cases and the present case ought to be treated as an old case is taken note of only to be rejected. The present matter cannot be treated as a re-opening of an old case for the simple reason that the respondents did not issue the impugned order by re-opening the petitioners case. In fact, the impugned order came to be passed for the first time and it was not on the basis of any representations made by the petitioner for enhancement of his pay scale by grant of any upgradation. Having unilaterally taken a decision to pass an order dated 18.7.2011, the respondents cannot be permitted to discriminate against the petitioner by declining to grant him the monetary benefits

payable w.e.f. 1.4.2003, the date from which he was granted the Third Time Bound Promotion. The petitioner, who is an Assistant Surgeon (Migrant), is similarly placed as Dr. Vinod Kumar Bhat, Assistant Surgeon (Migrant) and he ought to have been treated on the same footing for grant of similar relief as was granted to his colleague.

30. In view of the aforesaid findings, this Court is of the opinion that the impugned order dated 18.7.2011 granting the Third Time Bound Promotion to the petitioner ought to be modified by deleting the words, notionally and monetarily therefrom. Accordingly, the present petition is allowed and the respondents are directed to amend the order dated 18.7.2011, by granting the Third Time Bound Promotion in the pay-scale of `4100-5300/- (pre-revised) in favour of the petitioner w.e.f. 1.4.2003. It is further directed that the entire monetary benefits payable to the petitioner under the Third Time Bound Promotion shall be payable from the date of his entitlement and the arrears shall be released in favour of the petitioner within three months from today, failing which the said amount shall carry simple interest payable by the respondents @9% per annum, till realization. The petitioners in the two connected petitions shall also be entitled to similar relief as granted to the petitioner in W.P.(C) 1104/2013.

31. The writ petitions are allowed and disposed of, with litigation costs of `7,500/- awarded in favour of each of the petitioners. OCTOBER31 2014 sk/mk W.P.(C) 1104/2013, 2874/2013 & 2884/2013 (HIMA KOHLI)

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