

HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Civil Writ No. 6881/2015

Champalal Vyas S/o Bhawani Shanker Vyas, Age 58 years, Caste Brahmin, resident of Nehru Colony, Adarsh Marg, Balotra (Barmer)

----Petitioner

Versus

1. State of Rajasthan through Secretary, Education (Secondary), Secretariat, Jaipur.
2. Director, Secondary Education Rajasthan, Bikaner.
3. Principal Secretary, Department of Personnel, Secretariat, Jaipur.

---Respondents



S.B. Civil Writ No. 6897/2015

Laxmi Narayan Soni S/o Dadumal Soni, Age 55 years, Caste Soni, Address - Principal Government Senior Secondary School, Siwana (Barmer)

----Petitioner

Versus

1. State of Rajasthan through Secretary, Education (Secondary), Secretariat, Jaipur.
2. Director, Secondary Education Rajasthan, Bikaner.
3. Principal Secretary, Department of Personnel, Secretariat, Jaipur.

----Respondents

S.B. Civil Writ No. 8587/2015

Gopaldas Soni S/o Daduram Soni, Age 57 years, Caste Soni, resident of Pipa Ji Mandir Ke Paas, Rai Colony, Barmer.

----Petitioner

Versus

1. State of Rajasthan through Secretary, Education (Secondary), Secretariat, Jaipur.
2. Director, Secondary Education Rajasthan, Bikaner.
3. Principal Secretary, Department of Personnel, Secretariat, Jaipur.

----Respondents

For Petitioner(s) : Mr. Kshamendra Mathur
 For Respondent(s) : Mr. B.L. Bhati, Govt. Counsel.

HON'BLE MR. JUSTICE P.K. LOHRA

Order

23/07/2018

In all these writ petitions grievances of the petitioners in general are founded on identical facts and for craving desired reliefs they have taken shelter of common grounds, therefore, all are heard together and disposed of by a common order.



The undisputed facts of all these writ petitions are that petitioners were initially recruited as Lecturer, School Education, pursuant to their selection by the Public Service Commission. With the passage of time, when all the petitioners became eligible for promotion to the post of Principal, Senior Secondary School, instead of conveying meeting of Departmental Promotion Committee (DPC), second respondent ordered their posting as Principal in their existing Pay Band and Grade Pay - Patey Vetan. The details of each petitioner showing their date of initial appointment as Lecturer School Education and posting as Principal in existing Pay Band and Grade Pay - Patey Vetan is as under:

Name	Date of Initial Appointment as Lecturer-School Education	Posting as Principal in existing Pay Band and Grade Pay - Patey Vetan (Pay Scale No.17)	Date of Patey Vetan order
Champalal Vyas	22.01.1985	820-1550	16.10.2009
Gopaldas Soni	10.10.1984	820-1550	10.10.2008
Laxmi Narayan	22.01.1985	820-1550	16.10.2009

While working on the post of Principal in their existing Pay Band and Grade Pay – Patey Vetan, candidature of all the petitioners is considered for regular promotion by the DPC. The DPC found all the petitioners suitable for promotion and accordingly recommended for their promotion. Pursuant to recommendations of DPC, petitioners are promoted as Principal.

Details about promotion orders and year of vacancy is as under:



Name	Date of promotion order	Year of vacancy
Champalal Vyas	06.05.2013	2008-2009
Gopal Das Soni	06.05.2013	2008-2009
Laxmi Narayan	06.05.2013	2010-2011

Grievance of the petitioners is denial of Pay Band and Pay Scale of Principal from that date they took the charge of said post. It is pleaded by the petitioners that when they have discharged duties of higher and responsible post, depriving them Pay Band and Pay Scale commensurating with the post is arbitrary and illegal besides being violative of principles of equal pay for equal work. Petitioners have also averred in the petitions that existence of vacancies, their eligibility for the promotional post, was not taken care by the respondents due to their inaction of belated convening meeting of DPC. Besides claiming requisite emoluments in the Pay Band and Pay Scale of Principal for the intervening period, during which petitioners have discharged duties of Principal on Patey Vetan, they have also prayed for benefits of pay fixation by reckoning their services from the date duties of Principal are assigned to them.

In the reply, besides taking certain preliminary objections, respondents have pleaded that the claim of petitioners for Pay Band and Grade Pay of Principal is not sustainable being contrary to the terms and conditions of the posting orders. It is also averred in the return that employees are not entitled for higher pay for mere satisfactory services of certain period on higher post without availing promotion in accordance with the rules. As per version of the respondents, issuing orders assigning higher duties of the post of Principal to the petitioners was working arrangement and therefore they have been rightly paid benefits of salary on Patey Vetan basis. Respondents have also averred in the reply that promotions were accorded to the petitioners as per rules on the recommendations of DPC and they have been allowed pay scale of the post of Principal from the date of regular promotion with notional benefit of pay fixation on higher post from the year of vacancy their candidature is adjudged suitable by the DPC. While referring to the example of Yudhisthar Gaur, it is averred by respondents in the reply that he was erroneously granted benefit of pay fixation from an earlier date and same cannot be cited as a precedence by the petitioners to claim equality, which is a positive concept inasmuch as concept of equal treatment does not countenance repetition of wrong action. It is also stated in the reply that petitioners were running in pay scale of Principal after getting the benefit of ACP during the period they were working on the said post on Patey Vetan basis, and therefore, they are not entitled for additional financial benefits.

I have heard learned counsel for the parties and perused the materials available on record.

The crucial question, which has emerged for consideration of the Court in these matters, lies in a narrow compass. Indisputably, while working on the post of Lecturer, the feeder post, petitioners Champalal and Laxmi Narayan acquired eligibility for promotion to the post of Principal in the year 2008-2009 and

Gopaldas Soni in the year 2010-2011 respectively. In case of petitioners Champalal Vyas and Laxmi Narayan, their posting order as Principal were issued on 16th of October, 2009 and 19th of October, 2009 whereas in case of petitioner Gopaldas Soni, the order was issued on 10th of October, 2008. In the reply,

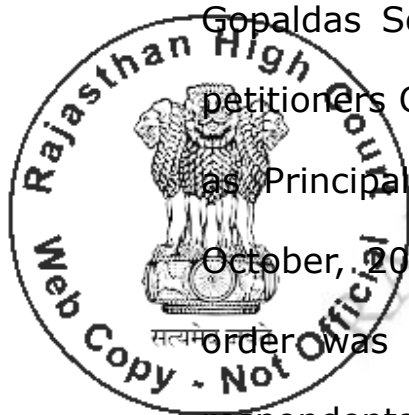
respondents have not shown any plausible and satisfactory reason for not holding DPC every year in adherence of Rule 9 of the Rajasthan Education Service Rules, 1970 (for short, 'Rules of 1970'). Rule 9 enjoins upon appointing authority to determine yearwise vacancies to be filled by each method, i.e., direct recruitment or promotion. Rule 9 of the Rules of 1970 reads as under:

"9. Determination of vacancies-(1) (a)

Subject to the provision of these rules, the Appointing Authority shall determine on 1st April every year, the actual number of vacancies occurring during the financial year.

(b) Where a post is to be filled in by a single method as prescribed in the rule or Schedules, the vacancies so determined shall be filled in by that method.

(c) Where a post is to be filled in by more than one method as prescribed in the rules or Schedules, the apportionment of vacancies, determined under clause(a) above, to each such method shall be done maintaining the prescribed proportion for the over all number of posts already filled in. If any fraction of vacancies is left over, after apportionment of the vacancies in the manner prescribed above, the same shall be apportioned to the quota of various methods prescribed in a continuous cyclic order giving precedence to the promotion quota.



(2) The Appointing Authority shall also determine the vacancies of earlier years, yearwise which were required to be filled in by promotion, if such vacancies were not determined and filled earlier in the year in which they were required to be filled in."

Division Bench of this Court, in Rajasthan Council of Diploma Engineers & Anr. Vs. State of Rajasthan & Anr. [1991(2) WLC (Raj.) 597], while considering the true purport of Rule 9,

observed that it cannot be applied with same rigor in case of direct recruitment but its adherence with rigor is essential in respect of promotion. The Court held:

"Rule 9 of the Rajasthan Service of Engineer (Building and Roads Branch) Rules, 1954 as amended vide notification No. F.7(1) D.O.P. A-II/81 dated 21.12.81 with effect from 1.4.1981 is mandatory, but in view of the absence of any provision regarding unfilled vacancies of earlier years falling in direct recruitment quota, it cannot be applied for year-wise selections in case of direct recruitment with the same rigour as it is to be applied in the case of vacancies of earlier years in respect of promotion quota."

From the undisputed factual matrix in all these matters, it is clearly borne out that all the petitioners are working on promotional post of Principal without any interruption with satisfactory performance. Furthermore, all the petitioners are adjudged suitable for promotion in the DCP held on 6th December, 2013 and were allotted their respective year of vacancy for promotion. Therefore, the delayed action on the part of respondents in holding DPC cannot be cited as a reason for depriving the petitioners of financial benefits besides seniority etc. From the reply of respondents also, no plausible reason is forthcoming for delayed convening of DPC.



High Court of Delhi, in case of H.B. Sharma Vs. Union of India [1996(4) SCT 339 (Delhi)], in almost similar circumstances held that when post is vacant, convening DPC every year is mandatory. While granting relief to the incumbent, the Court made following observations:



"I have heard learned counsel for the petitioner and the respondent and have perused the writ petition, reply and rejoinder. I have carefully comprehended import of the said circular dated 7.8.59 issued by the MCD. I have also carefully gone through the relevant Supreme Court judgments in support of the proposition of the learned counsel. In view of the clear enunciation of law as set out in the aforesaid cases, particularly in the cases of A.K. Jain and Gangadhar Kar's and Delhi Water Supply and Sewage Disposal Committee (supra) which has been approved later on by the Constitution Bench in the case of Direct Recruit Class Ii Engineering Officers' Association vs. State of Maharashtra and others. The conclusion seems to be irresistible. In the instant case the claims of all the eligible and qualified candidates were considered at the time of ad hoc appointment and such appointment continued uninterruptedly till the regularisation of service by the Departmental Promotion Committee or the Union Public Service Commission, there is no justification in excluding such service for determining the seniority. Of course, in absence of any statutory rules or executive order to the contrary in the instant case, when the current duty charge was given to the petitioner along with other officers in the year 1986, claims of all the eligible and qualified candidates were considered and after considering their claims, they were given ad hoc appointments and the ad-hoc appointments have continued from 13.5.86 till 30.9.92 when the appointments were regularised.

On the basis of these large number of judgments of the Supreme Court, the petitioner and all others similarly placed who have continued uninterruptedly till the regularisation of service by the Dpc or the Upsc would be entitled to all get the benefit of the continuous uninterrupted service for determination of their seniority and consequently they would be entitled to promotion from the date when they were given current duty charge to the post of Assistant Commissioner vide order dated 13.5.86 and later on this current duty charge according to the assertions in the counter affidavit was converted into ad hoc appointment vide order dated 19.9.86 from the date

of their assuming the current duty charge (13.5.1986). Therefore, in the instant case, the petitioner and similarly placed officials would be entitled to get the benefit of service from 13.5.1986 and all consequent benefits."

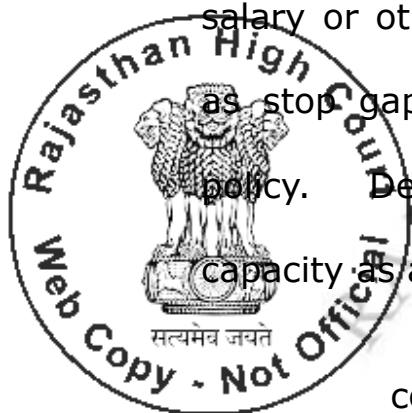
The argument of learned counsel for the respondents, that petitioners were paid salary and other emoluments in terms of their posting orders containing the recital "Patey Vetan", appears to be quite alluring but not of substance. It is really strange that petitioners were asked by the respondents to discharge duties of Principal carrying higher responsibility by evolving a novel and iniquitous design namely concept of 'Patey Vetan'. In my view, while passing the posting orders of petitioners, the respondents have acted in an absolutely arbitrary and unreasonable manner in clear negation of the doctrine "equal pay for equal work", enshrined under Article 39(b) read with Article 14 of the Constitution.

Supreme Court in case of P. Grover (Smt.) Vs. State of Haryana & Ors. [(1983 4 SCC 291)] in almost identical situation granted salary of higher post of the appellant employee. The Court held:

"All that was said in the counter-affidavit was that there were no Class-I post available and therefore, she was not entitled to be paid the salary of District Education Officer. We are unable to understand the reason given in the counter-affidavit. She was promoted to the post of District Education Officer, a Class-I post, on an acting basis. Our attention was not invited to any rule which provides that promotion on an acting basis would not entitle the officer promoted to the pay of the post. In the absence of any rule justifying such refusal to pay to an officer promoted to a higher post the salary of such higher post (the validity of such a rule would be doubtful if it existed), we must hold that Smt. Grover is entitled to be paid

the salary of a District Education Officer from the date she was promoted to the post, that is, July 19, 1976, until she retired from service on August 31, 1980. The appeal is accordingly allowed with costs."

In its later judgment, Secretary-cum-Chief Engineer, Chandigarh Vs. Hari Om Sharma & Ors. [(1998) 5 SCC 87], Supreme Court found agreement of employee not to claim higher salary or other attendant benefits of the higher promotional post as stop gap arrangement unenforceable and against the public policy. Deprecating such practice of the Government in its capacity as a model employer, the Court observed:



"Learned counsel for the appellant attempted to contend that when the respondent was promoted in stop-gap arrangement as Junior Engineer I, he had given an undertaking to the appellant that on the basis of stop-gap arrangement, he would not claim promotion as of right nor would he claim any benefit pertaining to that post. The argument, to say the least, is preposterous. Apart from the fact that the Government in its capacity as a model employer cannot be permitted to raise such an argument, the undertaking which is said to constitute an agreement between the parties cannot be enforced at law. The respondent being an employee of the appellant had to break his period of stagnation although, as we have found earlier, he was the only person amongst the non-diploma-holders available for promotion to the post of Junior Engineer I and was, therefore, likely to be considered for promotion in his own right. An agreement that if a person is promoted to the higher post or put to officiate on that post or, as in the instant case, a stop-gap arrangement is made to place him on the higher post, he would not claim higher salary or other attendant benefits would be contrary to law and also against public policy. It would, therefore, be unenforceable in view of Section 23 of the Contract Act, 1872."

A learned Single Judge of this Court in case of Vijay Kumar Damor & Ors. Vs. State of Rajasthan & Ors. (S.B. Civil Writ

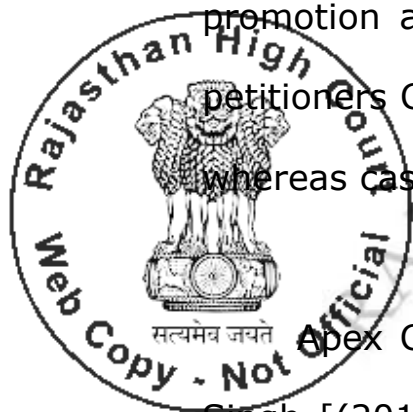
Petition No.6547/2011, decided on 19th of September, 2012), while disapproving such practice of the Government, held:



"It is submitted that posting of the petitioners as Lecturer was made as an administrative arrangement on temporary basis in their "pantey vetan". The term "pantey vetan" as explained by learned Government Advocate is the pay-scale in which the petitioners were already running at the time of their posting as Lecturer. The fact mentioned in the reply that the petitioners are working as Lecturer is sufficient to establish that adequate number of vacancies pertaining to the post of Lecturer were available and the respondents utilised services of the petitioners thereon without making promotions in accordance with the Rules. When the respondents are utilizing services of the petitioners on the post of Lecturer that too from last about a decade, then there is no just reason available to deny pay-scale pertaining to the post concern. The posting of the petitioners on higher post, as a matter of fact, is nothing but a promotion looking to the administrative exigency, though that is termed as "administration arrangement in pantey vetan". Once the services of the petitioners are utilized on higher post, they became entitled for fixation of their pay in the pay-scale attached with that post. They are discharging the same duties as discharged by other lecturers employed by way of direct recruitment or by way of promotion, as such the respondents are required to maintain a parity in granting pay to the persons discharging similar duties. The case of the petitioners is not of intermittent officiation on higher post while discharging their normal duties but of discharging duties of higher post for all purposes excluding the duties relating to the substantive post held by them. The non grant of the pay-scale applicable to the post of Lecturer to the petitioners despite utilizing their services on that post is not permissible in view of the doctrine of "equal pay for equal work" enshrined under Article 39(d) read with Article 14 of the Constitution of India.

Accordingly, this petition for writ is allowed. The respondents are directed to make fixation of the petitioners' pay in the pay-scale pertaining to the post of Lecturer from the date they were posted on the post aforesaid under the orders (Annex.1) collectively. The necessary fixation in pursuant to the directions aforesaid is required to be made within a period of three months from today. The petitioners shall also be entitled for arrears of wages."

The decision rendered in Vijay Kumar Damor (supra) was later on approved by the Division Bench vide judgment and order dated 18th of November, 2013. It is also noteworthy that in Damor's case, the incumbents had not availed regular promotion whereas in the instant case the petitioners have availed regular promotion as the DPC has found their candidature suitable for promotion against the year of vacancy. Therefore, the case of petitioners Champalal Vyas and Laxmi Narayan is on better footing whereas case of Gopaldas Soni is at par with Damor's case.



Apex Court in a recent judgment, State of Punjab Vs. Jagat Singh [(2017) 1 SCC 148], while extending benefit of equal pay for equal pay for equal work to temporary employees, observed:

"There is no room for any doubt, that the principle of 'equal pay for equal work' has emerged from an interpretation of different provisions of the Constitution. The principle has been expounded through a large number of judgments rendered by this Court, and constitutes law declared by this Court. The same is binding on all the courts in India, Under Article 141 of the Constitution of India. The parameters of the principle, have been summarized by us in paragraph 42 hereinabove. The principle of 'equal pay for equal work' has also been extended to temporary employees (differently described as work-charge, daily-wage, casual, ad-hoc, contractual, and the like). The legal position, relating to temporary employees, has been summarized by us, in paragraph 44 hereinabove. The above legal position which has been repeatedly declared, is being reiterated by us, yet again.

In our considered view, it is fallacious to determine artificial parameters to deny fruits of labour. An employee engaged for the same work, cannot be paid less than another, who performs the same duties and responsibilities. Certainly not, in a welfare state. Such an action besides being demeaning, strikes at the very foundation of human dignity. Any one, who is compelled to work at a lesser wage, does not do so voluntarily. He does so, to provide food and shelter to his family, at the cost of his self respect and dignity, at

the cost of his self worth, and at the cost of his integrity. For he knows, that his dependents would suffer immensely, if he does not accept the lesser wage. Any act, of paying less wages, as compared to others similarly situate, constitutes an act of exploitative enslavement, emerging out of a domineering position. Undoubtedly, the action is oppressive, suppressive and coercive, as it compels involuntary subjugation.”

In view of foregoing discussion, all these writ petitions are allowed and the respondents are directed to allow the petitioners; (1) Champalal Vyas, (2) Laxmi Narayan Soni, and (3) Gopaldas Soni, pay scale of the promotional post from the date they are performing duties of Principal, i.e., 30.11.2009, 20.09.2010, and 23.10.2009 respectively, with all other consequential benefits including the benefit of pay fixation. The requisite exercise of pay fixation and allowing other benefits be undertaken by the respondents within a period of three months from today and accordingly arrears be paid to the petitioners.

(P.K. LOHRA),J

