

State Of West Bengal And Ors vs Debasish Mukherjee And Ors on 14 September, 2011

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Bench: Markandey Katju, R. V. Raveendran

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Reportab

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3480 OF 2005

State of West Bengal & Ors.

... Appellants

Vs.

Debasish Mukherjee & Ors.

... Respondents

With

Civil Appeal No.3481 of 2005

Civil Appeal No.3482 of 2005

Civil Appeal No.3483 of 2005

Civil Appeal No.3484 of 2005

Civil Appeal No.3485 of 2005

Civil Appeal No.3486 of 2005

Civil Appeal No.3650 of 2005

Civil Appeal No.3609 of 2005

J U D G M E N T

R.V.RAVEENDRAN, J.

All these appeals question the common order dated 20.1.2005 of the Calcutta High Court allowing a batch of appeals by the employees of the High Court. The facts are similar and for convenience, we will refer to the facts from C.A. No.3480/2005.

2. One Gopniath Dey (for short 'Dey') was appointed as a Section Writer/Typist in the Original Side of the Calcutta High Court on 19.3.1964. He was brought under the regular establishment on 1.9.1979 and was allowed the pay-scale of ` 230-425 under the West Bengal Services Revision of Pay and Allowances Rules, 1970 (for short 'WB (ROPA) Rules, 1970'). The said pay-scale was subsequently revised as ` 300-685/- with effect from 1.4.1981 and under the WB (ROPA) Rules, 1981. He was granted a promotion as Typist, Grade I in the scale of ` 380-910/- with effect from 2.4.1981. He appeared in the selection examination for the post of Lower Division Assistant and was selected and appointed on 9.9.1985. On such appointment his pay was fixed as ` 550 in the scale of ` 300-685/-, taking into account his last pay drawn in the former Grade-I Post. On exercising option under the W.B. ROPA Rules, 1990, his pay scale was revised and re- fixed with effect from 1.8.1986. On 1.4.1989, he was awarded the second higher scale under the 20 years Career Advancement Benefit Scheme.

3. Sixty three employees who were senior to Gopinath Dey in the cadre of Lower Division Assistants, working in the Original Side of the High Court, submitted a representation to the Chief Justice on 27.6.1997 requesting that by relaxing Rule 55(4) of West Bengal Service Rules - Part I (for short 'WBSR') their pay be stepped up and re-fixed on par with the pay of their junior Gopinath Dey. The Chief Justice referred the representation to a Special Committee of three Judges and the said Committee submitted a report dated 2.12.1998 recommending rejection of the representation with the following observations :

"In our opinion Gopinath Dey has been given certain benefits to which he was not entitled to in law. We are of the view, the Rule 55(4) of WBSR Part-I cannot be said to have any application whatsoever in this case. It appears to us that Sri Gopinath Dey was granted undue benefits. The whole fact was not placed before us as to how he could be granted such benefits to which he was not entitled. If an illegality has been committed in the case of one employee, it is well settled in law, that on the basis of

such illegality another person cannot claim the same benefit. Illegality is incurable as has been held in AIR 1974 SC 2177 and AIR 1995 SC 705. Furthermore, Article 14 of the Constitution of India contains a positive concept. Reference may be made in this connection the decision reported in 1996 (2) SCC 459. See also 1998 Lab & I.C 180 and 1998 Lab & I.C 1976. In view of the decisions, illegality cannot be directed to be perpetuated. This illegal benefits granted to Sri Gopinath Dey, if any, cannot be extended to memorialists."

(Emphasis supplied)

4. Some time thereafter, the Dy. Secretary, Government of West Bengal, Judicial Department, by memo dated 5.12.2000 returned the Service Books of 18 employees (including that of Gopinath Dey) stating that the Career Advancement benefits granted to all of them were in order. Taking a cue therefrom, immediately thereafter, fifty employees (senior to Dey) including respondents 1 to 5, made another representation dated 10.1.2001 to the Chief Justice, stating that though seniors to Gopinath Dey, they were getting a lesser pay than Gopinath Dey, that by memo dated 5.12.2000, the state government had found the pay fixation of Gopinath Dey to be in order and therefore, their pay may be re-fixed to be at par with the pay of their junior - Gopinath Dey, by relaxing Rule 55(4) of WBSR.

5. In the meanwhile, Gopinath Dey retired from service in the year 2001. When his service book was forwarded to the Accountant General, West Bengal, for processing his pensionary claim, the office of the Accountant General returned the pension file to the High Court twice under cover of memo dated 21.12.2001 and again on 9.5.2002 to review the pay fixation of Gopinath Dey on the ground that awarding of second higher grade directly on 1.4.1989 was not in order and that career advancement benefit could be awarded to him only by reckoning the service from 9.9.1985.

6. The representation dated 10.1.2001 given by respondents 1 to 5 and 45 other senior employees, was also referred to a Three-Judge Special Committee and the said Committee submitted a report dated 27.11.2002 recommending that the said senior employees may be given the pay protection by stepping up their pay, so that their pay is not less than that of Gopinath Dey. The Special Committee held that the report dated 2.12.1998 of the earlier Special Committee was no longer effective, on the following reasoning :

"We find that the Special Committee of the three Judges in their report dated 2.12.1998 proceeded on the opinion that Sri Gopinath Dey was given the benefit to which he was not entitled in law and Rule 55(4) of the WBSR Part-I cannot be said to have any application whatsoever in this case.

But now it has been held that allowing the Career Advancement Benefit to Sri Gopinath Dey is in order and this has neither challenged in any proceeding nor set aside by any appropriate forum. In such circumstances, we are of the opinion that observations of the earlier Special Committee of three Judges has lost its force as it preceded on an opinion about the irregularity in granting such benefit to Sri

Gopinath Dey but presently, the same having been found to be in order, we felt that the present fifty memorialists are also entitled to pay protection so that they are not to get a pay lesser than Sri Gopinath Dey who is admittedly much junior to all the present memorialists."

7. The Special Committee was thus clearly of the view that if the fixation of pay of Gopinath Dey was erroneous or illegal, the memorialists would not be entitled to stepping up of pay to be on par with Gopinath Dey, but if the grant of Career Advancement benefit to Gopinath Dey was legal and valid, his seniors in the cadre would be entitled to stepping up of their pay so that their pay will not be less than that of Gopinath Dey. However, when the memos dated 21.12.2001 and 9.5.2002 from Accountant General's Office (stating that the grant of career advancement benefit to Dey was not in order) was brought to their notice, the Three-Judge Special Committee gave a further report dated 20.1.2003, modifying its earlier report dated 27.11.2002 by recommending that the memorialists be given the same benefit as was accorded to Dey, in keeping with the principle of pay protection so that their pay is equivalent to that of Dey in relation to his appointment as Lower Division Assistant on 9.9.1985. We extract below the reason assigned for such recommendation :

"Admittedly, all the memorialists are senior to Dey but were receiving lesser pay than Dey and even if Dey's service as Lower Division Assistant from 9.9.1985, it is to be taken into consideration for the purpose of grant of benefit of Career Advancement Scheme the memorialists would also be entitled to the same benefit taking the date of consideration in their case also from 9.9.1985. Whatever be the method of calculation as far as the fixation of Dey's pay is concerned, the memorialist, who are all senior to him in the same cadre, cannot get a lesser pay than Dey in keeping with the principle of Rule 55(4) of the West Bengal Service Rules-Part-I."

8. The Registrar (Original Side), High Court, placed the said report dated 20.1.2003 before the learned Chief Justice, with the following submission note : "I further submit before your Lordship for the reasons aforesaid, if your Lordship approved the recommendations of the Hon'ble Judges Committee for the said 50 memorialists be allowed and pay protection be given effect as per recommendations with intimation to the Government." On the said note, the Chief Justice made an order "Please do the needful" on 13.2.2003, thereby directing that the 50 memorialists be given pay protection as per the recommendation of the Special Committee in its report dated 20.1.2003.

9. The Registrar (Original Side) of the High Court issued the following note of acceptance dated 4.3.2003 extending the benefit of pay protection to the 50 senior employees (including respondents 1 to 5) :

"In approving the recommendation of the Hon'ble Judges' Committee on the memorial of fifty employees, the Hon'ble The Chief Justice in exercise of powers conferred under Clause 2 of Article 229 of the Constitution of India has been pleased to allow under order dated 13.2.2003 the following fifty employees who are seniors to Sri Gopi Nath Dey, the same benefit as given to Sri Gopi Nath Dey in keeping with the principle of pay protection under Rule 55(4) of the WBSR, Part-I so that their pay is

equivalent to that of Sri Gopinath Dey in relation to his appointment as Lower Division Assistant on and from 9.9.1985."

The State Government by its letter dated 7.3.2003 addressed to the High Court, traced the career and emoluments of Gopinath Dey from 1964 and pointed out that Dey was not entitled to Grade I promotion of Section Writer (Typist) in the scale of ` 380-910 under the ROPA Rules, 1981 with effect from 2.4.1981 as he had not been confirmed in that post at that time. The state government further pointed out as Dey was appointed as Lower Division Assistant as a direct recruit in the scale of ` 300-685/-, with effect from 9.9.1985, he was not entitled to the second higher scale under the career advancement scheme with effect from 1.4.1989. In view of it, the High Court corrected the service book of Gopinath Dey by giving him the benefit of Grade I promotion of Section Writer (Typist) with effect from 1.8.1982 instead of 2.4.1981. The High Court also sent a letter dated 9.4.2003 to the office of the Accountant General admitting the said mistake and confirming the correction in regard to grant of Grade I promotion to Gopinath Dey. In the said letter, the Registrar (Original Side) High Court also admitted that extension of twenty years Career Advancement Scheme Benefit to Dey with effect from 1.4.1989 was a mistake and the order granting such benefit was cancelled and the service book of Dey had been correct.

10. When the pay bills of the 50 senior employees who were given the pay protection by increasing their pay at par with that of Gopinath Dey, were sent to the Calcutta Pay & Accounts Office-II, they were returned with a Return Memo dated 21.4.2003 stating that before allowing any benefit relating to salary, allowances, leave and pension to the employees of the High Court, the prior approval of the Governor of the State was required. The High Court immediately sent a reply dated 24.4.2003 stating that the Chief Justice is empowered to dispense with or relax the requirement of all or any of the rules to such extent and subject to such conditions as he may consider necessary, for dealing with the employees of the High Court in a just and equitable manner. The Calcutta Pay & Accounts Office-II again returned the pay bills with a Return Memo dated 29.4.2003 stating that it had no authority to pay the bill amounts without the directions from the State Government. By another Return Memo dated 6.5.2003, the Calcutta Pay & Accounts Office requested the High Court to resubmit the bills which provided for a higher pay to the 50 employees after obtaining the clarification of the state government, regarding applicability of Rule 55(4) and the consent of the Governor. On 7.5.2003, the Government requested the High Court to review the entire matter in view of the fact that fixation of pay of Gopinath Dey at various stages was erroneous and required rectification.

11. At this juncture, respondents 1 to 5 approached the High Court and sought a declaration that they were entitled to pay protection as per orders of Chief Justice dated 13.2.2003 in the post of Lower Division Assistant, on and from 9.9.1985 in order to bring their pay at par with that of Gopinath Dey, who was their junior. They also sought cancellation of the return memo dated 21.4.2003, 29.4.2003 and 6.5.2003 of the Calcutta Pay & Accounts Office. Similar writ petitions were filed by other employees senior to Gopinath Dey. The West Bengal Government also filed writ petitions challenging the report of the Judges Committee dated 20.1.2003, order of the Chief Justice dated 13.2.2003 and the consequential orders dated 4.3.2003 issued by the High Court, extending the stepping up benefit to the senior employees.

12. The six writ petitions filed by the employees and three petitions filed by the state government were heard and disposed of by a learned Single Judge by a common order dated 17.11.2003. The learned Single Judge inter alia held Rule 55(4) was inapplicable as the two conditions for applicability of the said Rule were admittedly absent. As it was also admitted that Dey was wrongly given the benefits and Dey has not challenged the correction of his pay and direction for recovery of the amount paid in excess, it followed that Dey was not entitled to the benefits wrongly given and consequently, respondents 1 to 5 and other senior employees were not entitled to stepping up of their pay with reference to the pay of Dey. He dismissed the writ petitions by the employees and allowed the writ petitions by the state government and directed that any excess amount paid to the senior employees by stepping up their pay, should be recovered from them.

13. Feeling aggrieved, the employees filed appeals and those appeals were allowed by a Division Bench of the High Court by a common order dated 20.2.2005. The Division Bench held :

"(a) The Chief Justice had made the Calcutta High Court Rules, 1960 with the approval of the Governor of the State in so far as the rules relate to salaries, allowances, leave or pension. Once rules had been framed by the Chief Justice and were approved by the Governor in relation to financial matters, so long as there is no legislation by the State Legislature, action taken under the powers conferred by the rules cannot be questioned, when such powers exercised by the Chief Justice stood on equal footing to that of Governor.

(b) The state government could not raise any objection to the recommendation for fixation of salary, sanction of creation of posts or grant of increase in case of disparity in exceptional circumstances, particularly when it is aimed at the ameliorating the service conditions of the employees of the High Court. Such action of the Chief Justice, when exercised bona fide and when within the scope of the powers conferred on him, cannot be questioned by the executive or even by the court.

(c) The post of LDA is neither a higher nor a promotional post.

Rule 55(4) would therefore not be applicable. Gopinath Dey was holding an ex cadre post which was not one of the sources of recruitment to the post of Lower Division Assistant. The post held by Gopinath Dey was not a feeder post for the post LDA. The post of LDA was not a promotional post. The post of LDA was the bottom post in the cadre in which the recruitment was made. Therefore, none of the factors, in which higher pay could be justified with reference to the pay of a junior, were satisfied.

(d) The moment Gopinath Dey entered the post of LDA through direct recruitment, he acquired the lien of that post. He could not hold the lien of another cadre when he came through direct recruitment to the cadre of LDA. On his substantive appointment to the permanent post of LDA, his lien in the substantive ex cadre post held permanently stood terminated. Thus Gopinath Dey could not claim any benefit on account of his length of service by reason of any lien. Unless lien was available to him, he could not claim fixation of pay at a higher stage than those of his seniors.

(e) Once the state government claim that the pay of Gopinath Dey was correctly fixed, it cannot contend that the senior employees cannot claim parity on the basis of a wrong fixation of pay of Gopinath. When the pay was wrongly fixed and Gopinath Dey was given a higher pay, the respondents being senior to him cannot be paid less and are entitled at least to the same pay Gopinath Dey was given.

(f) The Special Committee submitted its report recommending pay protection which itself is an indication of an exceptional circumstance when it was found that the Gopinath was not entitled to fixation of pay and the senior employees were not entitled to the benefit of Rule 55(4) of WBSR Part-I.

(g) Once in his wisdom the Chief Justice takes action to grant increase in the pay of senior employees to bring their pay at par with that of Gopinath Dey, such action cannot be questioned if the action of the Chief Justice is based on a source of power. Rule 49 is the source of power. The exercise of such power is immune from being questioned, as it is not justiciable.

(h) Once the Chief Justice takes an action pursuant to the rules which have been approved by the Governor, such action does not require any further approval. If no approval of the Governor is necessary, the state government has no right to question the same, as that will run contrary to the autonomy of the Chief Justice as contemplated under Article 229(2) of the Constitution of India. The action of Chief Justice is non-justiciable. Under the usual circumstances, Gopinath Dey would not have been entitled to the increment, but the government had approved the same. Thus it had acquired a new dimension to justify the grant of higher pay to the respondents. The circumstances in which it was granted, were found to be exceptional due to which the Chief Justice has exercised his discretion. The wisdom of Chief Justice being non-justiciable, the state government cannot object to the same."

14. The said order is challenged in these appeals by special leave by the State of West Bengal on the following grounds :

(i) The senior employees through their repeated representations sought relief under rule 55(4) of the WBSR. The Special Committee consciously considered the merits of their claim with reference to the Rule 55(4) and made its recommendations expressly under the said Rule. The learned Chief Justice by his order dated 13.2.2003 merely accepted the said recommendation based on Rule 55(4). The learned Single Judge and the division bench found that Rule 55(4) was not attracted. Having reached such conclusion, the division bench could not justify the order dated 13.2.2003 of the Chief Justice by inferring that the Chief Justice must have granted relief in exercise of discretion under Rule 49 of WBSR.

(ii) Even assuming that Rule 49 of the WBSR could be regarded in itself as a source of power, in the absence of any consideration either by the Special Committee or by the Chief Justice, as to whether the fixation of pay in the post of LDA for Gopinath Dey at par with the last pay drawn by him in the old post of grade-I Typist/Section Writer

could not be regarded as an 'exceptional circumstance' for granting all Senior Lower Division Assistants pay protection. In the absence of exceptional circumstances, which is the condition precedent for the exercise of the power under Rule 49, the said rule cannot be invoked to justify the order of the Chief Justice.

(iii) In view of Rule 42 (1)(ii) of the WBSR, the fixation of pay of Gopinath Dey at higher initial start in the pay scale of LDA at par with the last pay drawn by him in the old post of Grade-I Typist/Section Writer was erroneous. Such wrong and illegal pay fixation will not entitle the other LDAs senior to him, to the same higher initial start, when all of them were being paid pay admittedly according to the pay scale for LDAs and at the stages to which they were otherwise entitled.

(iv) Having held that the fixation of pay at higher initial start for Gopinath Dey as a LDA was incorrect in terms of Rule 42(i)(ii) of the WBSR and Rule 55(4) of the WBSR was not applicable, the Division Bench could not justify the order of the Chief Justice extending pay protection to his seniors with reference to Rule 49 of WBSR. The Division Bench also fell into an error in holding that the order of the Chief Justice was non-justiciable in writ jurisdiction.

15. On the contentions urged, the following questions arise for our consideration :

(i) Whether the respondents (employees senior to Dey) were entitled to re-fixation of their pay at par with the pay of their junior namely Dey, under Rule 55(4) of the WBSR (Part I) or under any other service law principle?

(ii) If the relief granted to the respondents (employees senior to Dey) could not be supported with reference to Rule 55(4), whether it could be inferred that the order of the Chief Justice permitting the pay of the said senior employees to be brought at par with the pay of Dey, was passed in exceptional circumstances under Rule 49 of WBSR (Part I)?

(iii) Whether the order of Chief Justice dated 13.2.2003 is not justiciable ?

Re : Question (i) :

16. Rule 55(4) of WBSR, on which the senior employees placed reliance, to claim parity with the pay of Gopinath Dey, reads thus :

"55(4). If a government employee while officiating in a higher post draws pay at a rate higher than his senior officer either due to fixation of his pay in the higher post under the normal rules, or due to revision of pay scales, the pay of the government employees senior to him shall be re-fixed at the same stage and from the same date his junior draws the higher rate of pay irrespective of whether the lien in the lower post held by the senior officer is terminated at the time of re-fixation of pay, subject

to the conditions that both the senior and junior officers should belong to the same cadre and the pay scale of the posts in which they have been promoted are also identical. The benefit of this rule shall not be admissible in case where a senior government employee exercises his option to retain un-revised scale of pay, or where the pay drawn by the senior officer in the lower post before promotion to the higher post was also less than that of his junior."

On a careful reading of Rule 55(4), it is evident that two conditions will have to be fulfilled for attracting the benefit under the said rule. The first is that the junior employee as also the senior employees must be promotees. Secondly, they must come from the same cadre having the same scale of pay in their feeder post. Neither of the said conditions is fulfilled in this case. In fact, this finding was rendered by the learned Single Judge and was affirmed by the Division Bench. The Division Bench held :

"Admittedly, Rule 55(4) is not applicable on two reasons. First, that Rule 55(4) was inserted in WBSR subsequent to its adoption by the High Court. Admittedly, the High court did not adopt the same. On account of thereof, benefit of Rule 55(4) would not be applicable to the employees of the High Court. Second, Rule 55(4) applies in case of promotion or officiation in a higher post, as rightly contended by Mr. Ray. The post of LDA is neither a higher nor a promotional post. Rule 55(4) would, therefore, not be applicable in this case."

On a careful consideration, we find no reason to interfere with the said concurrent finding that Rule 55(4) is inapplicable.

17. We may now consider whether the private respondents are entitled to stepping up of their pay to bring it at par with that of Dey under the general principle of service jurisprudence. The principles relating to stepping up of pay of the seniors with reference to the higher pay of a junior are now well settled. We may refer to a few of the decisions of this Court in that behalf. In *State of Andhra Pradesh vs. G. Sreenivasa Rao* - (1989) 2 SCC 290, this Court observed :

"Equal pay for equal work" does not mean that all the members of a cadre must receive the same pay-packet irrespective of their seniority, source of recruitment, educational qualifications and various other incidents of service. When a single running pay-scale is provided in a cadre the constitutional mandate of equal pay for equal work is satisfied. Ordinarily grant of higher pay to a junior would ex-facie be arbitrary but if there are justifiable grounds in doing so the seniors cannot invoke the equality doctrine. To illustrate, when pay-fixation is done under valid statutory Rules/executive instructions, when persons recruited from different sources are given pay protection, when promotee from lower cadre or a transferee from another cadre is given pay protection, when a senior is stopped at Efficiency Bar when advance increments are given for experience/passing a test/acquiring higher qualifications or as incentive for efficiency ; are some of the eventualities when a junior may be drawing higher pay than his seniors without violating the mandate of

equal pay for equal work. The differentia on these grounds would be based on intelligible criteria which has rational nexus with the object sought to be achieved."

(emphasis supplied) This Court held that High Courts and Tribunals should not, in an omnibus manner come to the conclusion that whenever and for whatever reasons, a junior is given higher pay, the doctrine of 'equal pay for equal work' is violated and the seniors are entitled to the same pay, irrespective of the scope of the relevant Rules and the reasons which necessitated fixing of higher pay for juniors.

18. In Chandigarh Administration vs. Naurang Singh - (1997) 4 SCC 177, this Court held that principle of 'equal pay for equal work' and stepping up of pay would not apply where higher scale was granted to some persons by an evident mistake. This Court held :

"We are, however, of the opinion that a mistake committed by the Administration cannot furnish a valid or legitimate ground for the Court or the Tribunal to direct the Administration to go on repeating that mistake. The proceedings placed before us clearly show that the pay revision of September 19, 1975 was an unscheduled one, effected merely on the basis of a letter written by the Principal of the College. The Administration no doubt could have rectified that mistake. That would have been the most appropriate course but their failure to do so cannot entitle the respondents to say that mistake should form a basis for giving the higher pay scale to them also. The proceedings of the Administration dated 19.8.1982 clearly shows that the said higher pay scale was treated as personal to the then existing incumbents. As stated above that was really the pay scale admissible to the post of Assistants which was a promotion post to storekeepers. Both these posts cannot be given the same pay scale....An evident mistake cannot constitute a valid basis for compelling the administration to keep on repeating that mistake."

(emphasis supplied)

19. In Union of India vs. R. Swaminathan - (1997) 7 SCC 690, this Court considered the government order dated 4.2.1966 issued for removal of anomaly by stepping up of pay of a senior on promotion drawing less pay than his junior. This Court held :

"11. As the Order itself States, the stepping up is subject to three conditions: (1) Both the junior and the senior officers should belong to the same cadre and the posts in which they have promoted should be identical and in the same cadre; (2) the scales of pay of the lower and higher posts should be identical and: (3) anomaly should be directly as a result of the application of Fundamental Rule 22-C which is now Fundamental Rule 22(I)(a)(1). We are concerned with the last condition. The difference in the pay of a junior and a senior in the cases before us is not a result of the application of Fundamental Rule 22(I)(a)(1). The higher pay received by a junior is on account of his earlier officiation in the higher post because of local officiating promotions which he got in the past. Because of the proviso to Rule 22 he may have

earned increments in the higher pay scale of the post to which he is promoted on account of his past service and also his previous pay in the promotional post has been taken into account in fixing his pay on promotion. It is these two factors which have increased the pay of the juniors. This cannot be considered as an anomaly requiring the stepping of the pay of the seniors.

The Office Memorandum dated 4.11.1993. Government of India, Department of Personnel & Training, has set out the various instances where stepping of pay cannot be done. It gives, inter alia, the following instances which have come to the notice of the department with a request for stepping up of pay. These are:

(a) Where a senior proceeds on Extra Ordinary Leave which results in postponement of date of Next Increment in the lower post, consequently he starts drawing less pay than his junior in the lower grade itself. He, therefore, cannot claim pay parity on promotion even though he may be promoted earlier to the higher grade

(b) If a senior foregoes/refuses promotion leading to his junior being promoted/appointed to the higher post earlier, junior draws higher pay than the senior. The senior may be on deputation while junior avails of the ad hoc promotion in the cadre. The increased pay drawn by a junior either due to ad hoc officiating/regular service rendered in the higher posts for periods earlier than the senior, cannot, therefore, be an anomaly in strict sense of the term.

(c) If a senior joins the higher post later than the junior for whatsoever reasons, whereby he draws less pay than the junior, in such cases senior cannot claim stepping up of pay at par with the junior.

x x x There are also other instances cited in the Memorandum. The Memorandum makes it clear that in such instances a junior drawing more pay than his senior will not constitute an anomaly and, therefore, stepping up of pay will not be admissible. The increased pay drawn by a junior because of ad hoc officiating or regular service rendered by him in the higher post for periods earlier than the senior is not an anomaly because pay does not depend on seniority alone nor is seniority alone a criterion for stepping up of pay."

20. The facts narrated above, without anything more, would clearly show that Dey was given a higher pay for wholly erroneous reasons. Firstly he was given Grade I promotion of Section Writer (Typist) in the scale of ` 380-910 under the ROPA Rules, 1981 with effect from 2.4.1981 even though he was not confirmed in the lower post at that time. Secondly, even though Dey was appointed as Lower Division Assistant as a direct recruit in the scale of ` 300-685 with effect from 9.9.1985, he was given the benefit of second higher scale under the Career Advancement Scheme, with effect from 1.4.1989, by taking note of his previous service. Dey voluntarily chose to appear for selection as a Lower Division Assistant which carried a lesser pay scale when compared to the pay scale to which he was entitled as a Grade-I Typist, obviously because of better future prospects available to Lower Division Assistants. Having been appointed as a Lower Division Assistant on 9.9.1985, he was not

entitled to the benefit of second higher scale with effect from 1.4.1989, as that benefit was available only at the end of 20 years service under the career advancement scheme. If these two benefits erroneously given were deleted, there would be no ground for the seniors to claim any benefit on the basis of parity of pay. Even otherwise, as Dey was getting a higher pay in view of the earlier promotion as Section Writer/Typist, when he was selected and appointed as Lower Division Assistant, he was given pay protection and thus became entitled to a higher pay than what he would have normally received. His case was completely different from the case of his seniors and his seniors could not therefore claim parity in pay and stepping up of pay to match the pay of Dey. Therefore, the learned Single Judge and the Division Bench rightly held even that Rule 55(4) was inapplicable. The fact that a mistake was committed in the case of Dey by extending the benefit of second higher scale under Career Advancement Scheme cannot be a ground for the Chief Justice to direct perpetuation of the mistake by directing similar benefit to other senior employees. Further, in view of his previous service between 1964 and 1985 and in view of the fact he was getting a higher pay (in a higher pay scale) when he was appointed thereby entitling him to benefit of pay protection, his seniors who were not in a comparable position were not entitled to seek higher pay with reference to the pay of Dey.

21. It is now well settled that guarantee of equality before law is a positive concept and cannot be enforced in a negative manner. If an illegality or an irregularity has been committed in favour of any individual or group of individuals, others cannot invoke the jurisdiction of Courts and Tribunals to require the state to commit the same irregularity or illegality in their favour on the reasoning that they have been denied the benefits which have been illegally or arbitrarily extended to others. [See : Gursharan Singh vs. New Delhi Municipal Administration - 1996 (2) SCC 459, Union of India vs. Kirloskar Pneumatics Ltd. - 1996 (4) SCC 433, Union of India vs. International Trading Co. - 2003 (5) SCC 437, and State of Bihar vs. Kameshwar Prasad Singh - 2000 (9) SCC 94. This question was exhaustively considered in Chandigarh Administration vs. Jagjit Singh - 1995 (1) SCC 745, wherein this Court explained the legal position thus :

"8. The basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Generally speaking, the mere fact that the authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extra-ordinary and discretionary power of the High Court cannot be exercised for such a purpose. By refusing to direct the respondent-authority to repeat the illegality, the court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to

public interest. It will be a negation of law and the rule of law."

We are therefore of the view that neither under Rule 55(4) of WBSR nor under the general principles of service jurisprudence, the seniors were are entitled to claim benefit of re-fixation of their pay at par with the pay of their junior Dey.

Re : Question (ii) :

22. The representation given by the senior employees was for re-fixing their pay at par with the pay of Dey by relaxing Rule 55(4) of WBSR. The basis of their claim was Rule 55(4) and they sought relief by relaxing the said rule. The first report of the Special Committee dated 2.12.1998 considered the claim of senior employees under Rule 55(4) and categorically held that the said rule was inapplicable to their claim. The subsequent reports of the Committee dated 27.11.2002 and 20.1.2003 held that the employees who were senior to Dey, could not get a lesser pay than Dey, in keeping with the principle of Rule 55(4) and recommended grant of relief accordingly. The Registrar (Original Side), High Court put up a note placing the report of the Special Committee dated 20.1.2003 and sought approval of the said recommendation of the Special Committee for the senior employees being granted relief by way of pay protection by stepping up their pay at par with that of Dey. The Chief Justice concurred with the said proposal, without noting any other reason and thus, the Chief Justice merely accepted the reasons assigned by the Special Committee in their recommendation dated 20.1.2003. Even in their writ petitions, the senior employees made the claim only based on Rule 55(4). Neither the claim of the senior employees, nor the report of the Special Committee nor the order of the Chief Justice at any point of time, in any document, refer to any exceptional circumstances warranting the grant of increments prematurely to the employees senior to Dey by stepping up their pay at par with the pay of Dey. Rule 49 of WBSR was neither relied upon nor referred to by the senior employees in their representation, or by the Special Committee in their recommendations or by the Chief Justice in his order. Nor did the senior employees who were the writ petitioners, rely upon or refer to Rule 49 in the writ petition, as the source of power for the order dated 13.2.2003. In these circumstances, it is understandable how the division bench of the High Court, having held in the impugned order that Rule 55(4) was inapplicable, could justify the order of the Chief Justice with reference to Rule 49.

23. Rule 49 of WBSR (Part I) relates to premature increments and reads thus : "Save in exceptional circumstances and under specific orders of government, no government employee on a time scale of pay may be granted a premature increment in that time scale". The proviso to Rule 23 of the Calcutta High Court Service Rules, 1960, no doubt, provides that "the power exercisable under the West Bengal Service Rules by the Governor of the State shall be exercised by the Chief Justice" in regard to the members of High Court service. If Rule 49 had to be invoked, exceptional circumstances should have existed and should have been referred to in the recommendation by the Special Committee or in the order of the Chief Justice. The assumption made by the division bench that when an order of the Chief Justice granting relief cannot be justified with reference to any Rule or legal principle, it should be inferred that the order was made in exceptional circumstances, is erroneous and cannot be accepted. A provision for granting higher pay by way of premature increment in exceptional circumstances, cannot be used to give relief to a large number of

employees, without the existence of any exceptional circumstances. The fact that a single employee (Dey) was wrongly given some benefit is certainly not an exceptional circumstance to perpetuate the mistake in the case of all his seniors.

24. The division bench does not refer to any other exceptional circumstances. The logic of the division bench that the very fact that the Special Committee has made a recommendation and the very fact that the Chief Justice had accepted the recommendation and made an order granting relief, are indications of exceptional circumstances, is preposterous, irrational and arbitrary. The finding of the division bench that exceptional circumstances existed for stepping up the pay of large number of employees and therefore, the source of power for the order dated 13.2.2003 of the Chief Justice, is Rule 49 of WBSR is erroneous and improper and cannot be sustained.

Re : Question (iii)

25. We may next consider the correctness of the finding of the division bench that the order dated 13.2.2003 of the Chief Justice is not justiciable and the state government cannot challenge it in a court of law. At the outset, we may note that in a democracy, governed by rule of law, where arbitrariness in any form is eschewed, no government or authority has the right to do whatever it pleases. Where rule of law prevails, there is nothing like unfettered discretion or unaccountable action. Even prerogative power is subject to judicial review, but to a very limited extent. The extent, depth and intensity of judicial review may depend upon the subject matter of judicial review (vide observation of Constitution Bench in B.P. Singhal vs. Union of India - 2010 (6) SCC 331). The fact that in regard to certain types of action or orders of Chief Justice, the scope of judicial review may be very narrow and limited is different from saying that an order of the Chief Justice granting certain relief to High Court employees whose service conditions are governed by Rules, is not justiciable. Such orders are justiciable.

26. We may refer to the principles relating to the power and discretion of a Chief Justice of a High Court under Article 229(2) which reads thus :

"229(2). Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the court authorized by the Chief Justice to make rules for the purpose :

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the state..."

In exercise of the powers conferred by Article 229 of the Constitution of India, the Chief Justice of the High Court of Calcutta, with the approval of the Governor of the State of West Bengal, so far as the rules relate to salaries, allowances, leave and pensions, made the Calcutta High Court Service Rules, 1960, with respect to the appointment of persons to, and the conditions of service of persons serving on, the staff attached to the High Court. While the Chief Justice has the power to amend the Rules, he does not have the power to ignore the Rules. Rule 23 of the Calcutta High Court Service

Rules, 1960 provided thus :

"Subject to the following exceptions, the provisions of the West Bengal Service Rules in so far as they relate to salaries, leave and allowances, shall apply to the members of the High Court Service, Class - I, II, III and IV, as they apply to government servants of the corresponding classes in the service of the Government of West Bengal.

Provided that the powers exercisable under the West Bengal Service Rules by the Governor of the State shall be exercised by the Chief Justice and the power exercisable by any authority sub-ordinate to the Governor shall be exercised by the Chief Justice or by such person or persons as he may, by general or special order, direct."

27. In *M. Gurumoorthy vs. Accountant-General, Assam and Nagaland* - 1971 (2) SCC 137, this Court held that Article 229 contemplates full freedom to the Chief Justice of the High Court in the matter of appointment of officers and servants of the High Court and their conditions of service. The unequivocal and obvious intention of the framers of the Constitution in enacting Article 229 is that in the matter of such appointments, it is the Chief Justice or his nominee who is to be the supreme authority and there can be no interference by the executive except to the limited extent that is provided in the article. Even the Legislature cannot abridge or modify the powers conferred on the Chief Justice.

28. In *State of UP vs. C. L. Agrawal* - (1997) 5 SCC 1, a Constitution Bench of this Court considered a dispute relating to the competence of the Chief Justice of the High Court to grant advance/premature increments to an employee working in the High Court :

"The state government was of the view that the Chief Justice could not grant advance/premature increments without prior approval of the Governor. Instead of directly challenging the Chief Justice's competence, the State Government refused to take into account premature increments sanctioned to the respondent by the Chief Justice of the Allahabad High Court, while determining respondent's pensionary benefits. The matter was examined with reference to, (i) Article 229(2) and proviso thereunder, which lay down that the conditions of service of officers and servants of a High court shall be regulated by the rules made by the Chief Justice, etc. and the rules, if they relate to salaries, allowances, etc., shall require Governor's approval; (ii) Rule 3, two provisos to Rule 40(2) and proviso to Rule 41 of the Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976, which provide for creation of temporary posts with the approval of the Governor; applicability of state government rules to the High Court staff with such modifications, etc., as the Chief Justice may specify; obtaining of the Governor's approval where such modification, etc., relates allowances, leave or pensions; exercise of Governor's power by the Chief Justice in relation to High Court staff; (iii) Rule 27 of the Financial Handbook, Vol.II, Parts II to IV, which says that 'an authority may grant a premature increment to a government servant on a time scale

of pay if it has power to create a post in the same cadre on the same scale of pay."

Reading together the two provisos to Rule 40(2) of the Allahabad High court Officers and Staff (Conditions of Service and Conduct) Rules, 1976, this Court held that it was apparent that the rules and orders referred to therein were the rules and orders of a general nature and not orders made in individual cases; that insofar as officers and servants of the High Court were concerned, it was enough that the Chief Justice exercised the powers conferred upon the Governor under such rules and orders of the government and no further approval by the Governor is required. This Court also held that even in Rule 41, the reference was to the making of general orders and not the orders in individual cases. The order of the Chief Justice granting premature increments did not therefore require the approval of the Governor. It was held that as the Chief Justice had the power to create posts in the High Court, it was the Chief Justice who could grant premature increments under Rule 27 of the Financial Handbook, to the officers and servants of the High Court, and even if it was to be assumed that advance increments under Rule 27 could be granted by the Governor, the Chief Justice would exercise Governor's power by virtue of second proviso to Rule 40(2) of the 1976 Rules.

29. In High Court of Judicature for Rajasthan vs. Ramesh Chand Paliwal

- (1998) 3 SCC 72, this Court was considering the correctness of a direction given under Article 226, by a division bench of the High Court to the Registrar to prepare a report regarding the practicability of certain posts being manned by the officers from the establishment of the High Court instead of by Higher Judicial Officers and place it before the Full Court through the Chief Justice for taking a decision whether Judicial Officers could be relieved of such administrative posts in the High Court. This Court found that Rules 2, 2-A of, and Schedule I to the Rajasthan High Court (Conditions of Service of Staff) Rules, 1953, made by the Chief Justice in exercise of power conferred by Article 229, specified the posts on which officers of the Rajasthan Higher Judicial Service or Rajasthan Judicial Service were to be appointed. The method of recruitment had also been indicated. All appointments on these posts were to be made by the Chief Justice. The rules could be altered, amended or rescinded only by the Chief Justice who alone has the rule making power. This Court held that the real purport of the directions issued by the division bench on the judicial side was to override not only the constitutional provisions contained in Article 229 but also the rules made in exercise of powers available to the Chief Justice under that article. Even if the Registrar, in compliance of the impugned directions, is to report that the posts on which officers of the Rajasthan Higher Judicial Service or Rajasthan Judicial Service are appointed on deputation, could well be manned by the High Court staff itself and even if such report is placed before the Full Court, the Full Court cannot give a direction to the Chief Justice not to fill up those posts by bringing officers on deputation but to fill up those posts by promotion from amongst the High Court staff. A Judge of the High Court individually or all the Judges sitting collectively, as in the Full Court, cannot either alter the constitutional provisions or the rules made by the Chief Justice. The Chief Justice has been vested with wide powers to run the High Court administration independently so as not to brook any interference from any quarter, not even from his brother Judges who, however, can scrutinize his administrative action or order, on the judicial side, like the action of any other authority.

30. It is therefore clear that the Chief Justice has the power and authority to grant premature increments in exceptional circumstances. But the Chief Justice cannot grant such relief in an irrational or arbitrary manner. If the Rules provide that premature increments could be granted in exceptional circumstances, there should be a reference to the existence of exceptional circumstances and application of mind to those exceptional circumstances. When neither the recommendation considered by the Chief Justice nor the order of the Chief Justice referred to any exceptional circumstances and did not even refer to the Rule relating to grant of relief in exceptional circumstances, the question of assuming exceptional circumstances does not arise. The order dated 13.2.2003 is justiciable.

Conclusion

30. In view of the above, none of the seniors was entitled to any relief with reference to the pay of their junior Gopinath Dey. We therefore, allow these appeals, set aside the order of the division bench and restore the order of the learned Single Judge dismissing the writ petitions.

.....J [R. V. Raveendran]J [Markandey Katju] New Delhi;

September 14, 2011.