

CASE NO.:
Appeal (civil) 2906-2907 of 2001

PETITIONER:
ANIL RATAN SARKAR & ORS.

Vs.

RESPONDENT:
STATE OF WEST BENGAL & ORS.

DATE OF JUDGMENT: 20/04/2001

BENCH:
A.P. Misra & Umesh C. Banerjee

JUDGMENT:

BANERJEE, J.
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Leave granted.

The issue pertaining to fixation of pay scale, though irksome continues to be placed before this Court from time to time and this matter is no exception. Significantly, however, one ought to note at this stage only that the matter in issue has already traveled to this Court once before but the issue still persists surprisingly though but this has turned out to be the trend of litigation in this country.

The fact situation of the matter in issue involve the Physical Instructors and Graduate Laboratory Instructors in the employment of different non-governmental colleges in the State of West Bengal: The principal issue for adjudication presently however is whether the scale of pay given to the petitioners is in accordance with the writ of Mandamus as issued by the learned single Judge of the Calcutta High Court and as confirmed by the Appellate Bench of the High Court and stands accepted by this Court in terms of this Courts judgment and order dated 26th July, 1994.

Before advertng to the issue as noticed above and the rival contentions as raised therefor, a brief factual backdrop would be convenient at this stage.

The appellants are Science Graduates of different universities in the country and have been appointed as Laboratory Assistants in colleges and in addition to their normal duties, the appellants were supposed to assist the teachers and help the students in practical classes, impart instructions to the students in practical classes and to perform demonstration work including preparation of the lesson units in the practical classes. According to the appellants these Laboratory Assistants were all along being treated as teaching staff and pay and allowances including the Government share of Dearness Allowances were paid to them until the issuance of the government order No.288

Education (CS) dated 21st March, 1969 wherein Laboratory Assistants of non-government affiliated colleges were treated as members of the non-teaching staff. The effect of such re-designation had a direct impact as regards the payment of Dearness Allowances and obviously the same being prejudicial to the interest of the appellants, representations followed against the Government Order but, however, to no effect. Representations, were made since the withdrawal of teaching status was otherwise discriminatory as the Graduate Laboratory Assistants had to discharge teaching function as well, apart from the normal conduct of the Laboratory work.

The factual score depict that subsequently in August, 1983 the State Government redesignated the Laboratory Assistants as Laboratory Instructors - It is on this score that Mr. Ganguli, learned senior Counsel appearing in support of the appeals very strongly criticised. This change of nomenclature according to him was otherwise meaningless as there was neither any conferment of status of teachers or the grant of any pay scale consistent with the teaching status. The Government notification was attributed to be a mischievous deception and a hoax - a rather strong criticism: the question therefore arises whether there was any justification of such an attribute to the government notification dated 10th August, 1983: a short question consequently, thus what was the necessity for issuance of such an order would the change of nomenclature assist in any way the Graduate Laboratory Assistants? A bare perusal of the notification does not however give any reason whatsoever as to the necessity of its issuance the notification on the contrary makes it clear that there would be no enhancement of pay as also the status, as non-teaching staff would remain unchanged: It is only the word Assistant was replaced by the word Instructors but does that confer any material benefit to the persons concerned? The answer obviously cannot but be in the negative. It is on this background and upon perusal of the notification Mr. Gangulis criticism seems to be rather apposite though couched in a very strong language but by reason of the fact - situation of the matter in issue if we may say so, justifiably so. Incidentally, be it noted that Graduate Laboratory Assistants working in government colleges have been given the status and designations of Demonstrators and have been accepted as members of teaching staff. According to the appellants they possess similar qualifications, experience etc. but even though being similarly circumstanced, the Graduate Laboratory Assistants of sponsored and non-government private colleges of West Bengal stands discriminated against the Graduate Laboratory Assistants of Government colleges in West Bengal. The earlier writ petition which stands concluded by this Courts order dated 26th July, 1994 contained detailed list of University Acts and Statutes wherein teachers have been defined to include the Instructors.

Needless to place on record that by reason of the act of discrimination and having failed to obtain any redress from the State respondents these appellants moved the learned single Judge of the Calcutta High Court for issuance of a writ of Mandamus to treat the Graduate Laboratory Assistants as teaching staff as per the definition contained in different University Act and also to give them a scale of pay equivalent to that of Physical Instructors. By a judgment and order dated 29th July, 1987 the learned single

Judge issued a writ of Mandamus upon a detailed judgment the operative portion whereof is set out hereinbelow:-

The Rule accordingly is made absolute and the State Respondents are hereby commanded by the issuance of a writ in the nature of Mandamus to treat the Graduate Laboratory Assistants who have already been redesignated at Laboratory Instructors as teaching staff and to pay them in accordance with the existing scale of pay prescribed for the Physical Instructors with effect from 10th August, 1983 with all arrears.

The appeal taken therefrom by the State Government resulted in confirmation of the order by the judgment of the Appellate Bench dated May 15, 1992. The State of West Bengal, however, being aggrieved and dissatisfied with the judgment and order of the Appellate Bench of the High Court moved a Special Leave Petition under Article 136 of the Constitution before this Court and this Court finally on 26th July, 1994 refused to interfere with the order and disposed of the matter with a speaking order. Relevant extracts of the same however are set out herein below:-

.the Division Bench of the High Court upheld the findings of the learned Single Judge.

We have heard learned counsel for the parties. We see no ground to interfere with the reasoning and the conclusions reached by the learned single Judge as upheld by the Division Bench of the High Court. We are, however, of the view that the respondents-petitioners be paid the revised scale of pay, as directed by the High Court, with effect from August 1, 1987 instead of August 10, 1983. Mr. A.K. Ganguli, learned counsel appearing for the respondents has very fairly stated that his clients are not asking for the pay-scale of Lecturer. According to him, the pay-scale of Physical Instructors is equivalent to that of Demonstrators and that is the pay-scale to which his clients are entitled to in terms of the judgment of the High Court.

The arrears shall be paid to the respondents in two installments, first by the end of February 1995 and the second installment by August 31, 1995. The appeal is dismissed with the above modifications. No costs.

Significantly another class of Instructors also employed in non- government colleges were called Physical Instructors and prior to 2nd July, 1984 the Physical Instructors were of two categories in so far as the scale of pay was concerned, to wit, (i) those who had their qualification as Post-Graduate Diploma or certificate or a degree in Physical Education would be entitled to pay scale of Rs.550-900; (ii) those who did not possess the above qualifications Rs.425-700.

Subsequently, however, by reason of University Grants Commissions recommendations the State Government by its Order No.888 dated 2nd July, 1984 prescribed in the teaching category only one scale of pay for Physical Instructors and also with a direction that in future all appointments to Physical Instructors would have to be made from those having the qualification of Post-Graduate Diploma or certificate or a degree in Physical Education. The Government Order

noticed above in this paragraph revised the existing scale of pay to one composite scale of pay of Rs.700-1600 for Physical Instructors in the teaching category and a perusal of the said order does not leave any manner of doubt as regards introduction of only one scale of pay for Physical Instructors and with a teaching status.

Incidentally, during the pendency of the earlier appeal before the High Court the Government by an order No.579 dated 2.5.88 directed affiliating Universities to take necessary action for conferment of teaching status to the Graduate Laboratory Instructors of non-government college and in fact by a subsequent Government Order No.1039 dated 27th July, 1988 the Graduate Laboratory Instructors were declared as members of the teaching staff though, however, without granting any higher scale of pay obviously in accordance with the writ of Mandamus issued by the High Court as noticed herein before. Incidentally the pay scale of Physical Instructors having the teaching status was revised by Government Order No.517 dated 30.4.1990 from Rs. 700-1600 to 2200-4000 with effect from 1986.

It is at this juncture a further factual recapitulation may be convenient to the effect that this Court vide its judgment dated 26th July, 1994 upheld the reasonings and conclusions reached by the learned Single Judge as affirmed by the Division Bench but modified the relief regarding the date of introduction of the revised scale of pay to wit: from 1st August, 1987 instead of 10th August, 1983. It was never contended by the State (at least as appears from the records produced before this Court) that the Physical Instructors, holding teaching status, had more than one scale of pay after 2nd July, 1984. (Neither such a contention could be raised since there was only one scale of pay for Physical Instructors having teaching status). This aspect of the matter however been very strongly denied by Mr. Reddy, the learned Senior Counsel appearing for the State Government. Mr. Reddy contended that there are two definite classes of Physical Instructors one having Post-graduate diploma or certificate or a degree in Physical Education and the second being under-qualified Physical Instructors having a pay-scale of Rs.425-700 which stands recognised even in the Government Order No.589 dated 25th April, 1980. Mr. Reddy contended that it has never been revoked by a subsequent Government Order: whereas qualified Physical Instructors allowed the scale of pay of Rs.700-1600 with effect from 1.4.1980, the under-qualified Physical Instructors pay-scale remained at 425-700 on the same date until it was revised in January, 1986 when the under-qualified Physical Instructors were given pay-scale of Rs.1390-2970 in terms of ROPA Rules, 1996. Mr. Reddy contended that the qualified Physical Instructors, since 1.1.1996, in terms of the UGC pay scale, has been given the pay scale of Rs.8000-13500 and contended rather strongly the existence of a different scale of pay for under-qualified Physical Instructors - a sharp difference thus being created between under-qualified and qualified Physical Instructors the latter being governed by the UGC scale and the former in terms of ROPA, Rules of West Bengal. Mr. Reddy contended that UGC pay scale has been offered to those Physical Instructors having the qualification of Post-Graduate Diploma/certificate or degree in Physical Education Mr. Reddy emphasised further that existence of under-qualified Physical Instructors with a different scale of pay is hidden in the recording effected by this Court earlier and for

convenience sake is recapitulated once again herein below:
The earlier order contained as below:-

Mr. AK Ganguli, learned counsel appearing for the respondents has very fairly stated that his clients are not asking for the pay-scale of Lecturer. According to him, the pay scale of Physical Instructors is equivalent that of Demonstrators i.e. pay scale to which his clients are entitled to in terms of the judgment of the Hon. High Court.

(Emphasis supplied)

It is on this score Mr. Reddy contended that the statement of the learned senior counsel appearing for the Laboratory Instructors made at the time when the pay scale of the Physical Instructor is equivalent to that of Lecturer and pay scale of Demonstrator is not identical with Physical Instructor (qualified). Thus the observation cannot be followed in respect of graduate Laboratory Instructors equating with either of the two categories. In the implementation of the UGC pay scale of 1973 and onwards, it is mandatory that the teaching post which were in existence prior to 1.1.1973 would only come under the purview of UGC scale of pay and others under the State rules.

Mr. Reddy contended that Physical Instructors who possess the qualifications of Post-graduate diploma/certificate or degree in Physical Education were given the scale of pay of Rs.700-1600/- with effect from 1.4.1980 to 31.12.1985. The said scale has been further revised to Rs.2200- 4000/- with effect from 1.1.1986 which is further revised by UGC to Rs.8000-13,500/- which were also the scales of pay of lecturers and it was specifically stated on behalf of the employees through their senior counsel that they are not asking for the pay scale of lecturer which is Rs.2200- 4000/- at the material time.

It has been further stated that the observation made by the learned senior counsel on behalf of the Graduate Laboratory Instructors in this Court is followed in toto by the State Government in allowing the scale of Rs.1390-2970/- taking into consideration their teaching status and qualifications.

While the submissions of Mr. Reddy seems to be rather attractive at the first blush viz.-a-viz. the statement of Mr. Ganguli before this Court on the earlier occasion. But the factum of existence of two separate classes of Physical Instructors, one being a qualified and the other being a non-qualified Physical Instructors shall have to be considered and noticed with certain amount of caution in view of the factual matrix of the matter in issue and the records as is available even in this Court. Some record of proceedings may be useful to be referred to at this juncture.

(i) The order of the learned single Judge dealing with the present writ petition before the High Court recorded as@@@

position before the High Court recorded as
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follows:@@
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on 24.6.1997 Mr. Bihani prayed for time to file
affidavit affirmed by Secretary to the Government of West

Bengal, the Higher Education Department in qualifying the said position regarding two pay scales for Physical Instructors. Referring the said two pay-scales no notification or order could be produced. On the contrary, only one pay-scale has been mentioned in the report published by the Higher Education Department

(ii) Subsequently on 16th January, 1997 the learned Single Judge further recorded the following:@@

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under such circumstances, it is not clear on what basis the said affidavit has been affirmed by the said Kalyan Kumar Mandal, Assistant Director of Public Instruction that there is another category of Physical Instructor with B.A./B.Sc./B.Com. qualification in the scale of pay Rs.1390-2970.

Accordingly, the said Kalyan Kumar Mandal, Assistant Director of Public Instruction is directed to be personally present before the Court on 22.1.1997 with all records and explain on what basis he has filed such affidavit affirmed on 31.8.95 mentioning two categories of Physical Instructor. Learned Advocate for the State respondent is also directed to produce all records on the next date of hearing.

Be it noted that State of West Bengal sought time to produce relevant government records on more occasions than one as directed but no such documents were produced even by reason wherefor the learned Single Judge while disposing of the Writ Petition on 27th March, 1998 was pleased to observe in no uncertain terms about the non-production of documentary evidence in support of the contentions as raised and emphasised pertaining to the existence of qualified and under-qualified Physical Instructors. Similar contentions were raised by the State Government before the Division Bench of the High Court but without however any documentary support and when this Court heard the Special Leave Petitions after return of notices and by reason of the specific contentions of the appellants herein negating the existence of two groups of Physical Instructors. The learned counsel for the respondents wanted some time to obtain instructions and to file supplementary affidavit. This Court further granted 3 weeks time from the date of the order to file such an affidavit and the matter was directed to be listed after three weeks (vide order dated April 10, 2000). (iii) The records depict that this Court by a further order dated 18th August, 2000 offered a further opportunity and the order seems to be of some consequences, by reason therefor, the said order is set out in extenso as below:-

Mr. A.K. Ganguli, learned Senior Counsel appearing on behalf of the petitioners has taken us through the earlier judgment of the learned Single Judge dated 29.7.87 (page No.96) and of the Division Bench dated 15.5.1992 (page 99) and of this Court dated 26.7.94 (at page 112) and also pointed out that by the Government Order dated 2.7.84 (page 345), Physical Instructors have been brought into a single scale of Rs.700-1600 (which has since been revised as Rs.2200-4000) and that the petitioners are entitled to the said scale without any distinction between Graduates and Non- Graduates inasmuch as so far as Physical Instructors

were concerned, the above order of 1984 removed any such distinction.

On the other hand, Sri KK Venugopal, learned senior counsel appearing on behalf of the respondents has referred us to an affidavit filed by the Government in the High Court and pointed out that even for Physical Instructors, there was still distinction between these two categories. It was however, pointed out to learned senior counsel that this statement in the counter affidavit, prima facie runs counter to the earlier order of the Government dated 2.7.1984 whereby the distinction between the Graduates Physical Instructors and Non-Graduate Physical Instructors had been removed. At this stage, Sri KK Venugopal says that he would file all Rules/Circulars/Orders which relate to the pay scale of Physical Instructors and clarify the position.

The State Government may file by way of an affidavit referring to the Rules/Orders/Circulars if they are still maintaining a difference in scales between Physical Instructors in regard to Graduate and Non-Graduates.

The records of the Government Order however have not seen the light of the day even before this Court instead of such specific directions: is it a mere omission - unfortunately the contextual facts depict it otherwise. (iv) As late as February 28, 2001 this Court again directed as under:-

Mr. V.R. Reddy, learned senior counsel appearing for the respondents wants time to place before the Court the categorisation in two classes of the Physical Instructors referred at page 343 continued even subsequently including the revisional pay scale hence he wants to place in a tabular form the second category on which he wants to place the present petitioners. While doing so he should also refer to relevant rules and G.Os. under which the same continue. He seeks two weeks time for the same. List these matters after two weeks as part- heard when this Bench sits next.

On this score, a chart has been produced in Court on 20th March, 2001 which however cannot by any stretch be said to be in support of the contention of the State that there were existing two different grades and scales of pay amongst Physical Instructors one being to be a qualified Physical Instructor and other being unqualified Physical Instructor. Significantly the annual report as published by the Education Department of the State Government unmistakably record the existence of one grade of Physical Instructor under paragraph 8.16. The annual report details out teachers of Government Colleges in the manner as below:

8.16 Teachers of Government Colleges

S.No.	Category of teachers	Pay scale
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(Basic)

w.e.f. 1.1.1986

Rs.1740-3000	5.	Demonstrator
	4.	Physical Instructor@@
Rs.2200-4000	3.	Lecturer@@
	2.	Professor/Vice Principal

Rs.3700-5700

(Grade-II)

1.

Principal

Rs.4500-7300

Paragraph 8.2.1 also records the details of the Administration of Non-Government Colleges as below:

The teachers of the non-Government Colleges are of the following categories (basic):-@@

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1.

Laboratory Instructor

Rs.1390-2970 2. Demonstrator@@

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3. Physical Instructor

as in

Government Colleges 4. Lecturer@@

JJJJJJJJJJJJJJJJJJJJJJJJJJJ

5. Principal

This itself however negates the contentions as raised by the State. Physical Instructors in non-Government Colleges are termed as teachers with scale of pay Rs.1390-2970 whereas Physical Instructors were also termed as teachers and scale of pay appears to be similar as in Government Colleges i.e. Rs.2200-4000. Secondly in paragraph 8.2.4 revised pay scale of the non-teaching posts (Group B pay scale) have been noted to be Rs.1390-2970. It thus leaves no manner of doubt that whereas the petitioners were shown as teachers of non-government colleges they were in fact granted the scale of pay applicable only to Group B employees belonging to non-teaching staff and thus granted a non-teaching scale to the petitioners.

It is on this score, however, Mr. Ganguli contended rather emphatically that the High Court fell into a great error in accepting the contention of having two classes of Physical Instructors without any factual or documentary support. The criticism of Mr. Ganguli seems to have some force since there was in fact a total failure on the part of the respondents to produce any documentary support in tune with the submission as noticed above - Obviously the records apparently runs counter to the submission and findings as recorded by the High Court.

The purport of the order of this Court is not very far to seek: there is a definite approval of the reasoning and conclusion as reached by the learned Single Judge as upheld by the Division Bench of the High Court and the alteration is only from 1983 to 1987. Reliance on Mr. Gangulis statement as recorded in the earlier order of this Court that his clients are not asking for pay scale of Lecturer and would be happy if the pay scale of Physical Instructors are made available to them does not really alter the situation. Admittedly, Lecturers are a rank higher than the Physical Instructors as the Professor/Vice Principal is a rank higher than the Lecturer and the Principal two ranks higher than the Lecturers.

It is however in terms of the order of this Court as noticed herein before, the State Government on 26th December, 1994 has issued a circular obviously in proposed compliance with the order of this Court. Let us however

examine the circular and assess the situation ourselves as to the compliance of the earlier order of this Court. The circular reads as below:-

In the circumstances, the Governor is pleased to order that the scale of pay in respect of all graduate laboratory instructors of non-Government colleges may be revised to Rs.1300-45-1615-55-2056-66- 2445-2970/- with effect from 1st August, 1987 and the arrears involved on account of revision of their scale of pay paid in the manner as indicated above.

The Governor is further pleased to order that the graduate laboratory instructors of Non- government colleges shall continue to enjoy teaching status as given to them in GO No.1030- Edn.CS dated 27.7.1988.

This circular however stands challenged before the learned single Judge who was pleased to quash the same upon acceptance of the contentions of the writ petitioners the appellants herein. The learned Single Judge categorically recorded that the petitioners being Graduate Laboratory Instructors, question of further classifying them does not and cannot arise and upon reliance of the annual report as noticed above quashed and set aside the circular. The State Government however being aggrieved went before the Appellate Court and the Appellate Bench however allowed the appeal and opined that the Government Order dated 26th December, 1994 cannot be said to be arbitrary or contrary to the decision of this Court. Since it is clearly stated therein that Graduate Laboratory Instructors shall continue to enjoy the teaching status. The High Court, however, has failed to appreciate the role of Physical Instructors in the matter of fixation of pay scale in terms of the order of this Court and it is on this count a definite statement has been made even before this Bench that there are existing two definite classes of Physical Instructors one being qualified and another being unqualified, but there is no factual support therefor. Surprisingly, the basis of the order of this Court has not been delved in to by the High Court and the High Court thus clearly fell into an error. Needless to say that in the event there was some documentary support viz.-a-viz. the stand of the respondent-State as regards the existence of two definite Grades of Physical Instructors obviously the Government Order issued in December, 1994 could not have been found fault with since the same would have been in consonance with the order of this Court. But there being no factual support therefor, we are not in a position to record our concurrence with the submissions of Mr. Reddy as regards the justifiability of making Group B salary available even after conferment of teaching status as upheld by the Appellate Bench of the High Court. The conferment of status as a teacher runs counter to fixation of pay scale of Group B employees since all the other teachers of the Government and non-government colleges are placed in the category of teachers. A teacher cannot possibly be allowed a pay scale of a non-teaching post: The same is contradiction in terms and we need not dilate thereon. The criteria of fixation of pay scale is dependant upon the placement of the person concerned in the event the placement is in a teaching post obviously one expects to get a pay-scale fixed as a teacher and not as a non-teaching member of the staff. Apparently the High Court has not delved with the issue in this perspective and thus clearly fell into an error in categorising a teacher with a non-teaching pay-scale. The circular clearly authorises the

Graduate Laboratory Instructors of non-Government colleges to continue to have the teaching status but decry the financial benefits therefor! Would the same be not an arbitrary exercise of powers or can it by any stretch be suggested to be otherwise rational and indiscriminatory. This Court at an earlier occasion unequivocally upheld the reasonings of the learned Single Judge in the earlier writ petition as accepted by the Appellate Bench and on the wake of such a finding of this Court question of decrying a pay scale which is otherwise available to another teacher (in this case the Physical Instructor) does not and cannot arise more so by reason of the earlier order of this Court. Administrative ipsi dixit cannot infiltrate on to an arena which stands covered by judicial orders.

On the wake of the aforesaid these appeals succeed and are thus allowed, the order of the Appellate Bench of the High Court stands set aside and quashed. The order of the learned Single Judge stands restored. The entitlement by reason of the revision be made available from August 1, 1987 as directed by this Court in the earlier judgment dated 26th July, 1994. There shall be no order as to costs.