

Equal Pay for Equal Work- A Paradigm Shift

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I. ABSTRACT

Temporarily Engaged Employees have resorted to the judicial system for redressal of their grievances but have often left empty handed. They have demanded the upgradation of their pay as compared to what is paid to permanent employees. The practice of temporary appointment is not seen as a stop-gap solution to staff shortages but as a means to subvert the compliances required under India's labour legislations. They are not given any benefits of regular employment such as provident fund contributions or retrenchment compensation. Therefore, the practice of contract employment has become extremely attractive for every strata of employers right from software companies to the government itself.

Since 1998 thousands of temporary employees have been working in pathetic socio economic conditions but nothing has been done so far. Every year landlord increases the rent; inflation is also getting higher and higher. Permanent employees get Dearness Allowances (D.A.) every six months but so far as temporary employees are concerned, they are not getting any relief. Amount once fixed as salary continues for year to year. Everyone wants a dignified life with all rights such as food, shelter, medicine etc. but all these rights cannot be availed in the meager amount given to a temporary employee. It is necessary that we evolve a framework that dissuades employers from continuing with such a practice.

The principle of 'equal pay for equal work' would be applicable to all the concerned temporary employees, so as to vest in them the right to claim wages, at par with the minimum of the pay-scale of regularly engaged Government employees, holding the same post. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

II. INTRODUCTION

The earning of livelihood became an important aspect of life after coming into existence of culture as many physiological changes occurred during the process of evolution. In the cultural set up it became very difficult for a human being to survive therefore he became victim of circumstances. After coming into existence of State, man searched for employment and other sources so as to earn his livelihood and survive in this cruel

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world.

Since the origin of mankind, the main desire has been for social security. All human beings want minimum requirement of food, shelter and clothing. There have been historical revolutions in China, Russia and other countries to have economic security and emancipation from exploiters yoke. In human society, there cannot be mathematic equality nor is it physically and humanly possible. There has been endeavour to reduce it to the minimum gap and effort will continue till the survival of the human beings.²

Socio-economic structure of India is such that some people live affluently and majority of them lead a life below poverty line. Some have palatial bungalow's to live in and large number of people in big cities like Calcutta, Bombay sleep on pavements and slum. Compulsions of unequal distribution of land in the villages and village society, which is unable to provide employment to its inhabitants, make them to rush to the cities for work.³

Man on account of dire necessity to eke out livelihood accepts, whatever is given to him. He accepted minimum low wages than minimum or even lesser than fair wages. Strange situation is experienced and seen daily that on account of its having been situated in a disadvantageous position accept lesser wage but his counter parts doing the same work in the same organisation of same quality gets more. There is an inequality in such like situation or nature.

'Pay Gap' or unequal pay is an issue which has become a matter of concern these days due to an increase in the instances of discriminatory pay scales for the same type of work. India still lacks a comprehensive and transparent wage policy for all the sectors of the economy. This makes the issue of potential demand for equal pay a matter of concern in recent times. Equal pay here relates not only to basic pay but includes other benefits and allowances too.⁴

III. EQUAL PAY FOR EQUAL WORK

Equal pay for equal work is the concept of labour rights that individuals in the same workplace be given equal pay. Equal pay relates to the full range of payments and benefits, including basic pay, non-salary payments, bonuses and allowances.⁵

In international human rights law, the statement on equal pay is the 1951 Equal Remuneration Convention, Convention 100 of the International Labour Organization(hereinafter ILO), a United Nations(hereinafter

² R.K. Mahajan: "Doctrine of Equal Pay for Equal Work: Judicial Activism", Vol. I, Jan-April, SC.J, 1991, p. 65.

³ I.C. Awasthi, "Contractual Employment in Indian Labour Market : Emergence and Expansion", 2010, <http://books.google.co.in/books?isbn=8180696987>, pp. 322-325.

⁴ S.K. Chakraborty, —Right to Employment in India: A Jurisprudential Approach, <http://papers.ssrn.com/s013/papers.cfm> retrieved on 15-10-2014.

⁵ Jain. M.P., —Indian constitutional Law, Wadhwa Nagpur, 2008, p. 1542.

U.N's) body. The Convention states that-

“Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.”

Equal pay for equal work is also covered by Article 7 of the International Covenant on Economic, Social and Cultural Rights, Article 4 of the European Social Charter, and Article 15 of African Charter on Human and Peoples' Rights. The Constitution of the International Labour Organization also proclaims "the principles of equal remuneration for equal value".

The EEOC's four affirmative defenses allows unequal pay for equal work when the wages are set "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) ... any other factor other than sex." A pay differential due to one of these factors is not in breach of the Convention.

In India efforts are employed on this issue - Equal Remuneration Act, 1976 being the prime one amongst them. The Act by means of Section 4 not only emphasizes on equal pay for equal work but even bars the employer from reversing the pay scales in order to attain equilibrium.

IV. EQUAL PAY FOR EQUAL WORK AND INDIAN CONSTITUTION

The Constitution of India is the supreme law of the land and there is nothing beyond the Constitution. According to the Kelson's pure law theory the Constitution of India is the grand norm means, it is at the top and there is nothing beyond that. The Constitution of India takes care of every section of the society to protect their rights of individuals and at the same time it restricts the state not to violate the rights of person guaranteed by the Constitution.

The Constitution of India, in its attempt to build an egalitarian and secular ideology engrafted into it principles of equality, liberty and justice proclaimed in the Declaration of Human Rights.⁶

The preamble of the Indian Constitution sets out the main objectives, which the framers of the constitution intended to achieve.⁷ It seek to secure to all its citizens including women justice, social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status, and opportunity, and promote among the people of India fraternity assuring dignity of individual for all its citizens including women.

The philosophy of the Constitution is enshrined in the fundamental rights (hereinafter referred as F.R) and directive principles of state policy. Among the F.R, article 14 guarantees "equality before law and equal

⁶ S.C. Srivastava: "Equal Remuneration for men and women", J.I.L.I., 1990. p. 83-84.

⁷ Dr. Zaheeruddin: "Equal Remuneration to Men and Women", Awards Digest, Vol. XXXII-11-12, Nov-Dec., 2006, p. 272.

protection of laws within the territory of India". Article 15 prohibits discrimination on grounds, inter alia of sex. Article 15(3) empowers the state to make, any special provision in favour of women. Article 16 guarantees equality of opportunity in matters of public employment. While Article 16(1) ensure equality of opportunity for all citizens including women in matter relating to employment or appointment to any office under the state, article 16 (2) prohibits discrimination in respect of any employment or office under the state on the ground, inter alia, of sex.⁸

The general statements laid down in the preamble have amplified and elaborated in the Constitution.⁹ The state has been directed "to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of national life."¹⁰ Article 39 of the Constitution relating to the directive principles is more specific and comprehensive in nature. This article with six sub-clauses is analogous to one contain in article 45 (2) of the Irish Constitution. This article specifically requires the state to strive for securing equal pay for equal work of both men and women.¹¹

V. JUDICIAL GRAMMER OF INTERPRETATION

The principle of Equal Pay for Equal Work was first considered in *Kishori Mohanlal Bakshi v. Union of India*¹² in the year 1962 where the Supreme Court declared it incapable of being enforced in the court of law.

However, it received due recognition only in 1987 through *Mackinnon Mackenzie's case*¹³. Here the issue of concern was a claim for equal remuneration for Lady Stenographers and Male Stenographers. This was ruled in favour of lady stenographers as the Court was in favour of equal pay. Although, times have passed but crisis still remain. The report published by International Trade Union Confederation (ITUC) in March 2009, reveals existence of gender pay gap to the extent of 30 percent in India in 2008.¹⁴

Agreed that the issue is more rampant in case of gender pay gap and is being dealt with, but this is not the

⁸ *Randhir Singh vs. Union of India*, AIR 1982 SC 879, e.f. *Kishori Mohanlal Bakshi vs. Union of India*, AIR 1962 SC 1139.

⁹ Part IV, these deals with directive principle of state policy.

¹⁰ Art. 38, Constitution of India.

¹¹ Article 39: "The State shall in particular, direct its policy towards securing - a) that the citizen, men and women equally, have the right to an adequate means of livelihood. b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. d) that there is equal pay for equal work for both men and women. e) that the health and strength of workers, men and women and the tender age of the children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. f) that children are given opportunities and facilities to developed in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

¹² *Kishori Lal Mohan Lal Bakshi v. Union of India*, A.I.R. 1962 S.C. 1139 http://www.companyliquidator.gov.in/12/jud_sc/OFFICIAL%20LIQUIDATOR%20VS.%20DAYANAND.pdf

¹³ *Mackinnon Mackenzie and Co. Ltd. vs. Audrey D'Costa and Others* (1987) 2 SCC 469 http://www.ilo.org/public/english/employment/gems/eeo/law/india/case_law.html.

¹⁴ ITUC Report 2008, Gender (in) equality in the labour market: an overview of global trends and developments Retrieved, 18th July, 2009 from ITUC Report online via access: http://www.ituc-csi.org/IMG/pdf/GAP-09_EN.pdf.

complete picture. There are instances where such pay inequalities exist even in case of persons of the same gender. This is despite the fact that they are deploying same efforts and time and doing same kind of work as their counterparts. In spite of having made endless efforts still there is lack of a subsequent and meaningful legislation.¹⁵ Also factors like ignorance and uniform interpretation of law act as barriers in demolishing pay gap. In order to resolve this issue, it is important to not only create awareness for, but also effectively implement the legislative enactments.

A. State of Punjab and Ors vs. Jagjit Singh:-

The judgement of the Supreme Court in State of Punjab and Ors vs. Jagjit Singh and Ors¹⁶ on 26th October, 2016 appears to present a shift in judicial reasoning behind granting pay parity to temporary employees with permanent employees.

It is common knowledge that temporary employees while putting the same or even more amount of work, are blessed with the lesser pay as compared to permanent employees and the biggest reason why such employees remain in service accepting lesser pay is the hope that they would be absorbed in permanent and regular service when opportunity arises.

The institutions also encourage the practice of hiring contractual or temporary employees for the liability of the institutions in terms of expenditure towards salary and other benefits of such employees is reduced and the employees are more amenable towards obeying directions and complying with the wishes of the higher officers due to the temporary nature of their job, the continuance of which is to an extent dependant on the wishes of such officers.

This judgement, which is in series of a long list of judgments on the above area of equal pay for equal work would be instrumental in removing the arbitrary distinction between employees engaged in similar work on the basis of their designation as temporary or permanent. This judgement must have brought about cheers to lots of temporary employees around the country which is timely and welcome. The primary aspect that arises from this judgement is that it appears the court has brought a different reasoning for providing pay parity to temporary employees with permanent employees. In the instant case, the question before the court for consideration was-

“whether temporarily engaged employees (daily-wage employees, ad-hoc appointees, employees appointed on casual basis, contractual employees and the like), are entitled to minimum of the regular pay-scale, along with dearness allowance (as revised from time to time) on account of their performing the same duties, which are discharged by those engaged on regular basis, against sanctioned posts”.

¹⁵ Krishnadas Rajagopal, Globalization blinds us to aam aadmi plight: SC, INDIAN EXPRESS, Jan. 28, 2010, available at <http://www.indianexpress.com/news/globalisation-blinds-us-to-aam-aadmi-plightsc/ 572348>.

¹⁶ CIVIL APPEAL NO. 213 OF 2013.

The court considered several of its previous judgements on the same aspect in which the court has held that the denial of right to equal pay for equal work is violative of Articles 14, 16 and Article 39 (d) of the Constitution.

In *D. S. Narkara vs. Union of India*¹⁷ the court considered article 38 (d) of the Constitution of India that requires that the State shall strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations, while Art. 39 (d) enjoins a duty to see that there is equal pay for equal work for both men and women.

In *Dhirendra Chamoli v. State of U.P.*¹⁸ (1986) 1 SCC 637, the court invoked Article 14 which provides for equality before law and equal protection of the law to hold the right of equal pay for equal work for temporary employees that are engaged in similar work as regular employees. The judiciary has continually interpreted the Directive Principles of State Policy to broaden the ambit of the fundamental rights and has interpreted the fundamental rights in a fashion so as to provide teeth to the directive principles of state policy. This approach of the court is visible in this area of 'equal pay for equal work' also wherein the directive of article 39 has been given effect to through the fundamental right enshrined in Articles 14 and 16 in earlier cases and presumably through Article 21 in this case. There is however, a different aspect that has appeared to occur in the instant case. In the previous cases, the court has invoked the socialist pattern of the society and the concept of the welfare state to provide the direction of equal pay for equal work.

In the context of ruling over the right of equal pay for equal work, the court stated-

"...that it was not open to the Government to exploit citizens, specially when India was a welfare state, committed to a socialist pattern of society..."

While,

In *Surinder Singh v. Engineer-in-Chief, CPWD*¹⁹, the court held-

"that the principle of 'equal pay for equal work' was not an abstract doctrine. It was held to be a vital and vigorous doctrine accepted throughout the world, particularly by all socialist countries..."

In *State of Madhya Pradesh v. Pramod Bhartiya*,²⁰ it was held that-

"the doctrine of equal pay for equal work is implicit in the doctrine of equality enshrined in Art. 14, and flows from it. The rule is as much a part of Art. 14 as it is of Art. 16(1).

¹⁷ 1983 AIR 130.

¹⁸ (1986) 1 SCC 637.

¹⁹ (1986) 1 SCC 639.

²⁰ AIR 1993 SC 286.

In the present case, however the court invoked Article 7 of the International Covenant on Economic, Social and Cultural Rights, 1966, ratified by India on 10.4.1979, which provides for-

“(i) fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”

and stated further that-

“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... [A person accepts lesser wages] 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...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”.

B. Concept of Human Dignity

Human dignity mentioned at the outset of the Article 1 of the Universal Declaration of Human Rights 1948, which is the most important document in the world. The Universal Declaration of Human Rights provides the preliminary work out for protecting and development of right to life with human dignity in the various constitutional laws of various countries in the world. Every person has inalienable right to live with dignified life without discrimination.

In *Munn v. Illinois*²¹ Justice Field defined the term Life as-

“By the term life as here used something more is meant than mere animal existence .The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg...”

From the various cases as discussed above it appears that the Supreme Court seeks to underpin the right to equal pay for equal work on the foundation of fundamental rights. In several cases in the past the court has expounded the right to live with human dignity as a fundamental right under article 21.

In *Vikram Deo Singh Tomar v. State of Bihar*²², the court has held that-

“the right to live with human dignity is the fundamental right of every Indian citizen”.

²¹ 94 U.S. 113 (1876).

²² 1988 AIR 1782.

In Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and Ors.²³ and in Miss Mohini Jain vs. State of Karnataka²⁴, the court has stated that-

“...the right to life is not limited only to protection of limb or faculty. It goes further and embrace something more. The right to life includes the right to live with human dignity and all that goes along with it”.

Similarly, In Bandhua Mukti Morcha v. Union of India²⁵, the court stated that-

“...the right to live with human dignity enshrined in Article 21 derives its life breath from the Directive principles of State Policy”.

This brings to us the important question as to what was the philosophy of the Court that brought about the judgment. It appears that the Court has emphasized on the aspect of human dignity and has avoided any reference to the socialist philosophy, which may lead to the conclusion, though it could be far-fetched at this stage to state, that the judicial philosophy in India is shifting gradually from underpinning the judgments to the socialist philosophy and veering towards the human rights jurisprudence.

The previous judgments as pointed out above had stated that ‘equal pay for equal work’ was a socialist ideal of a welfare state, but the present judgement provides that declining ‘equal pay for equal work’ hits at the very fundamental aspect of article 21 that provides for life with human dignity as a part of “protection of life and personal liberty’ and the Preamble of the Constitution of India which provides for ‘FRATERNITY assuring the dignity of the individual’. This appears to be a revolutionary development in judicial thinking and would likely to have effect on various other judgements of the Supreme Court and High Courts where the numerous rights of individuals would necessarily be tested against the supreme norm of human rights and fundamental rights as against the socialist ideology.

VI. CONCLUSION

The provision of Part III and Part IV are complementary and supplementary for each other. Fundamental Rights are but means to achieve the goals intended in Part IV the Constitution. As, equal pay for equal work does not expressly provided by the constitution under the head of Fundamental Rights but these principles are the goals and fundamental in the governance of the country, therefore these F.R’s must be construed in the light of these Directive Principles.²⁶

²³ 1981 AIR 746.

²⁴ 1992 AIR 1858.

²⁵ 1984 AIR 802.

²⁶ Unni Krishnan v. State of Andhra Pradesh, 1993 AIR 2178.

This judgment is indeed a welcome step and provides the right direction in terms of ensuring equality. Non-permanent employees are meant to be used only for business exigencies and not for wage arbitrage. Unfortunately, there continues to be instances of discrimination of such non-permanent staff in India, especially contract labour, which discrimination must be avoided at all costs. Infact, the Contract Labour (Regulation & Abolition) Act, 1970 (“**CLRA**”) requires the contractor to ensure that the rates of wages payable to the workmen of the contractor are not less than the rates prescribed under the Minimum Wages Act, 1948. The SC judgment should, in our view, help change the way employers approach such non-permanent staff leading to significant reduction in wage discrimination.

Having traversed the legal parameters with reference to the application of the principle of ‘equal pay for equal work’, in relation to temporary employees, the most important factor that would require determination is whether the concerned employees are rendering similar duties and responsibilities as are being discharged by permanent employees, holding the same/corresponding posts. This judgment of the SC makes it clear that a mere difference in nomenclature is not sufficient to disentitle a temporary employee from being paid wages at par with permanent employees.