

IN THE HIGH COURT OF DELHI AT NEW DELHI

+WP(C) No. 4657/2005

Date of Decision: 14.03.2008

#Union of India & Others
!

....Petitioners
Through: Mr.A.K. Bharadwaj

Versus

\$G.D. Goel
^

.....Respondent
Through Mr.R.K. Gupta

WP(C) No. 1894/2007 & CM Appl. No. 3496/2007

#Union of India & Others
!

....Petitioners
Through: Mr. A.S. Dateer

Versus

\$Sh. Mumtaz Ahmad
^

.....Respondent
Through Mr. Lalta Prasad

AND

WP(C) No. 12285/2004

#The General Manager,
Northern Railways
!

....Petitioner
Through: Mr. T. Mahipal

Versus

\$Sh. D. Thomas
^

.....Respondent
Through Ms. Meenu Maini

CORAM :-

***THE HON'BLE MR.JUSTICE A.K.SIKRI**

THE HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.

:

1. Perennial issue, which keeps cropping up and arises in this petition as well, relates to arrears of pay for intervening period after an employee is granted notional promotion from the back deemed date. The contention of the concerned employee in all such cases is always that he was denied promotion to a higher post wrongly by the department and, therefore, once the department has realised its mistake and given the promotion from a back date which was legitimately due to him, the notional promotion would be no consolation and he cannot be denied the arrears of pay for the intervening period.

2. On the other hand, submission of the department in such cases is that by giving notional promotion the incumbent gets due seniority as well as proper pay fixation but he is not entitled to the arrears of pay from the deemed date of promotion to the date of his posting in the promotional post, as he has not worked during that period and, therefore,

principle of 'No work No pay' would be applicable.

3. In all these cases before us, the employer has denied the benefit of salary for past period though promotion granted retrospectively and pay fixed notionally from the date of promotion.

4. We find that number of cases are decided by the Apex Court as well as various High Courts and in some cases, relief of arrears of pay is granted, while in some other cases it is denied applying the doctrine of 'No work No pay'. Determination of the circumstances under which an employee should be given the arrears of pay and under what circumstances in which he can be denied this benefit is the task before us which we will endeavour to carry out relying upon the principles laid down in the decided cases.

5. The first case which needs mention in the chronology of the judgments, we are taking stock of, is the decision of the Supreme Court in ***Paluru Ramkrishnaiah & Ors. v. Union of India & Anr. - (1989) 2 SCC 541***. The Court in this case held that in case the promotion granted with retrospective effect, back wages

for the period for which the person actually did not work in the promotion post is not payable. This view was taken on the basis of the following factual background:-

“16. It may also be noticed that even though the petitioners on their completion of two years’ service as Supervisor ‘A’ were not promoted as Chargeman II in or about the year 1966 they chose to wait for about 17 years to file these writ petitions which were filed in 1983, and nearly 2 years even after the decision dated February 2, 1981 in Civil Appeal No.441 of 1981, which indicates that but for the decision in Civil Appeal No.441 of 1981 they would perhaps not have thought of filing these writ petitions inasmuch as in the meantime they had not only been promoted in the normal course as Chargeman II but some of them had been promoted even to higher posts in the hierarchy.”

6. In ***Union of India and Ors. vs. K.V. Jankiraman & Ors. - (1991) 4 SCC 109***, this issue came up for consideration namely whether the Government could deny the benefit of wages for the past period if he was granted promotion subsequently but from back date. Union of India had contended that a person cannot be allowed to draw benefits of a post the duties of which he had not discharged. This contention was negated as not applicable where an employee, who is willing to work, is kept away from work by the authorities for no fault of his. The Supreme Court observed as under:-

“24. It was further contended on their behalf that the normal rule is ‘no work no pay’. Hence a person cannot be allowed to draw the benefits of a post the duties of which he has not discharged. To allow him to do so is against the elementary rule that a person is to be paid only for the work he has done and not for the work he has not done. As against this, it was pointed out on behalf of the concerned employees, that on many occasions even frivolous proceedings are instituted at the instance of interested persons, sometimes with a specific object of denying the promotion due, and the employee concerned is made to suffer both mental agony and privations which are multiplied when he is also placed under suspension, when, therefore, at the end of such sufferings, he comes out with a clean bill, he has to be restored to all the benefits from which he was kept away unjustly.

25. We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of ‘no work no pay’ is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17(1) will also be in applicable to such cases.”

7. Issue again came up for consideration before the Supreme Court in the case of ***State of A.P. v. K.V.L. Narasimha Rao & Ors. – (1999) 4 SCC 181***. In this case also the court held that back wages are normally to be allowed in case of retrospective promotion. However, in the said case, the Court denied the benefit to the employee noting down the peculiar facts of this case

in the following terms:-

“5. In normal circumstances when the retrospective promotions are effected all benefits flowing therefrom, including monetary benefits, must be extended to an officer who has been denied promotion earlier. However, on the reorganization of States a large number of officers stood allotted from different States to the newly-formed State and their services had to be integrated on various principles and several agencies were involved in the same. The steps to be taken thereto were one of formulation of principles, publication of a provisional inter-State seniority list, inviting objections thereto, consideration of those objections in consultation with the Central Government and acting upon its directions to bring the seniority list in conformity with such directions. This entire exercise involved a good deal of time and gave rise to an extraordinary situation. It is in those circumstances that the rules contained in Fundamental Rule 26 or Rule 40 of the Hyderabad Civil Services Regulations have been framed. As a matter of fact, rules of the erstwhile State regarding seniority are not applicable in the new State as the allottees are governed by the Act and seniority is finalized therein. Even so, we do not see that there is any impediment to frame new rules affecting conditions of service of such allottees but in conformity with the Act. Surely new rules cannot be brushed aside by saying that they are not applicable to cases coming under the Act. There is no contention either in the High Court or before us that they are framed in contravention of the Act. In this background, we fail to see as to why the rules are not applicable to the respondents as held by the High Court.”

8. Another judgment which needs to be mentioned is in the case of ***State of Haryana & Ors. v. O.P. Gupta & Ors. - (1996) 7 SCC 533***. The controversy involved in the said case was whether the employees were entitled to arrears of salary for the period for which they had admittedly not worked, but had been given notional promotion from the deemed date. The matter related to a seniority dispute where fresh seniority list was directed to be prepared in accordance with rules ignoring any inconsistent administrative instructions. The Supreme Court held that entitlement of the employees to work arose only when they were promoted in accordance with rules and the preparation of seniority list was a condition precedent for the exercise. The employees could not be posted in the promotional post till the exercise was carried out and thus, their plea that they were willing to work had no legal foundation. The Court, thus, did not give these employees benefit of arrears of salary for the period they had not worked. The case of ***K.V. Jankiraman (supra)*** was discussed and distinguished. We may, for our purpose, take note of the following observations in the said judgment:-

“5. Shri Gupta, learned counsel appearing for the State, contended that the State was prepared to comply with the direction issued by the High Court in the first instance for the preparation of the seniority list but the rival candidates who claimed inter se seniority over the others approached the Division Bench and

also this Court for relief; since, ultimately, this Court has decided that seniority has to be prepared strictly in accordance with Rule 9 of the Rules, on receipt thereof, the Government has complied with the conditions of the preparation of the seniority list. Accordingly, they have been given the promotion with the deemed dates, though there was no specific direction in that behalf. Others who had joined the service have not claimed, except the respondents, but some of them were not even parties to the earlier writ proceedings or to the appeal in this Court and consequently, they are not entitled to the arrears. It is contended by Shri S.M. Hooda, learned counsel appearing for the respondents that the respondents were willing to work in the respective posts but they were not given the same. To avoid their entitlement, a seniority list was wrongly prepared denying them their entitlement to work in the promotional post; consequently, the respondents are entitled to the arrears of salary and the High Court was right in granting the same.”

9. We may also refer to two more judgments cited before us. These cases are:-

1. ***Union of India & Ors. v. Rejinder Singh Rawat - (1999) 9 SCC 173.***

2. ***State of Uttaranchal and Another v. Dinesh Kumar Sharma- 2007 1 SCC 683.***

10. In the first case mentioned above, namely, ***Rejender Singh Rawat*** (supra), the Court granted the relief in the following context:-

“2. The short question that arises for consideration is whether the High Court was justified in granting relief of payment of back wages to the respondent for the period he has not actually served. There is no dispute that the respondent's case was omitted from consideration on the ground that his chest was short by 2 cm. and as such he did not have the necessary physical standard, but, similar departmental candidates were considered and got the relief. The respondent's case was, therefore, appropriately considered by the appropriate authority and by letter dated 21-12-1995, it was conveyed that the respondent would be entitled to the rank of Assistant Sub-Inspector (Clerk/Typist) from 3-8-1992 the date on which panel of 1992 was released, with the further direction that his seniority would be protected on a notional basis, but he would not be entitled to any pay and allowances of Assistant Sub-Inspector (Clerk/Typist) for the back period and would be entitled to the same only from the date he assumes the charge physically.

3. In the teeth of the aforesaid order, the High Court was not justified in granting the payment of back wages for the period for which the appellant has not actually assumed the charge. In the aforesaid premises, we set aside the impugned order of the High Court and allow this appeal. There shall be no order as to costs.”

11. In ***Dinesh Kumar Sharma*** (supra), the Supreme Court was concerned with the issue for consideration as to whether seniority should be given to incumbents from the date when promotional fell vacant or from the date of his substantive appointment to the said vacant post. The Court held that the seniority could not be given retrospectively from the date of occurrence of vacancy. This case,

therefore, would not provide much assistance in dealing with the issue at hand.

12. We find from the aforesaid discussion that at times Supreme Court has granted the relief whereas on some other occasions, the arrears of salary for the period prior to the date of actual assumption of promotional post are denied. However, a closure scrutiny of the facts in each case would clearly reveal a discerning trend and there is no contradiction as far as principle of law laid down in various judgments is concerned.

13. The principle which can be deduced is that if a promotion is denied to an employee because of the mistake of the administration and due to no fault of the said employee, then the authorities are bound to pay the arrears of salary etc. upon giving him the benefit of retrospective promotion after realizing that mistake. This principle would be extended even to those cases where due to sheer negligence, carelessness or on account of malafides an employer denies the benefit of promotion to the employee at a proper time when it becomes due and gives him afterwards though retrospectively. (Also see ***State of Kerala and Others v. E.K. Bhaskaran Pillai - JT 2007 (6) SC 83***; ***Mohd. Ahmed v. Nizam Sugar Factory and Others - (2004) 11 SCC 210***; ***Nalini Kant***

Sinha v. State of Bihar and Others - 1993 Supp (4) SCC 748.

On the other hand, where there is genuine dispute and the promotion was delayed because of pendency of such a dispute and before the settlement of the dispute the promotion could not have been granted, the salary for the past period can be denied even when promotion is given retrospectively after the resolution of the dispute. Further the benefit of arrears of salary for past period can also be denied if it is found that it was not fault or mistake of the administration because of which the promotion was delayed.

14. In those cases where concerned employees seniors as well as juniors are granted the benefit of promotion and the salary for the period in question, same should invariably be given to such an employee who is given belated promotion retrospectively as non grant of arrears of pay and allowances of the higher post for the relevant period, in such circumstances, would amount to hostile discrimination.

15. Keeping in view these principles, we now take up each case for consideration.

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16. The respondent herein is a retired Principal, ACC Wing,

Dehradun, which is run by the Indian Military Academy (IMA) and is under the administrative control of the Ministry of Defence, Union of India. The incumbent holding the post of Principal of the said ACC Wing, retired after attaining the age of superannuation on 1.9.1984. The respondent at that time was working as Reader. Though the post of Principal fell vacant with the retirement of the then incumbent, no DPC was convened as there was no eligible Reader available, who could be promoted to this post. The process of reframing the recruitment rules for the post of Principal, ACC Wing was also underway. After the amendment in the Rules came through, which took significant time, the DPC was convened on 4.12.1992. The respondent was considered but was not found suitable. One another person Dr. R.N. Roy was appointed as the Principal. Aggrieved by his non-selection, the respondent filed OA before the Central Administrative Tribunal (in short the 'Tribunal') in the year 1993. This OA was disposed of on 30.7.1999 with a direction to the petitioners herein to convene a Review DPC. Pursuant to the said direction, Review DPC was convened in March 2000, but it found, once again, the respondent to be not suitable for promotion. Again not satisfied with this exercise of the DPC, the respondent preferred another OA challenging the

recommendations of the DPC in January 2001. This OA was disposed of by the Tribunal vide orders dated 5.11.2001 whereby the petitioners were again directed to re-convene a Review DPC and considered the claim of the respondent for promotion in accordance with O.M. dated 30.12.1976. Liberty was granted to the petitioners to rely upon the O.M. dated 24.10.1986 purportedly issued by the Department of Personnel and Training. In compliance with these directions, second Review DPC was held at the Army Headquarters. The respondent, in this exercise, was recommended for promotion by the DPC and accordingly, promoted to the post of Principal vide orders dated 12.8.2002. The promotion was, however, given from 24.10.1986, which was treated as deemed date of promotion. Pay of the respondent was accordingly fixed but actual financial benefits were given only from the date of promotion, i.e. 12.8.2002. This, according to the petitioners, was done in accordance with the FR 17 and CPRO 26.8.1990. The action of the petitioners in denying the actual arrears of pay for the period from 24.10.1986 to 11.8.2002 forced the respondent to approach the Tribunal third time seeking benefit of actual pay and allowances for the aforesaid period by filing OA No.2746/2003. This OA is allowed by the learned Tribunal

vide judgment dated 8.7.2004 relying upon the judgment of the Supreme Court in **Union of India and Ors. Vs. K.V. Jankiraman**, (1993) SCC (L&S) 387 and its own Full Bench in **B.S. Tyagi Vs. S.P. Mehta, General Manager, Northern Railways and Ors.**, 80 FB Judgment (2002-03) 143.

17. As is clear from the above, the respondent in this case had not been accorded promotion on the basis of corrected seniority list later on prepared on the basis of relevant rules and instructions. He had been denied promotion as the petitioners relied on wrong instructions. The said wrong was set right by convening Review DPC after the Tribunal's order dated 5.11.2001. When the Review DPC recommended the respondent for promotion, he was accorded promotion retrospectively. It is, thus, obvious that there is a mistake on the part of the department in not granting the promotion to the respondent by considering his case applying wrong instructions. Therefore, the respondent in such a case would be entitled to the arrears of salary for the past period and Tribunal rightly applied the ratio of ***K.V. Jankiraman & Ors.'s case (supra)*** and distinguished the case of ***O.P. Gupta & Ors.'s case (supra)***.

18. At the same time, we are of opinion that the respondent would not be entitled to arrears of pay with effect from 24.10.1986 as for a

portion of this period no fault lies with the administration. Facts revealed above would show that though the post of Principal fell vacant when earlier incumbent superannuated on 1.9.1984, DPC was not convened as there was no eligible Reader available who could be promoted to this post. The process of reframing the recruitment rules for the post of Principal, ACC Wing was also underway. The DPC for the first time could be convened only on 4.12.1992 which did not recommend the case of the respondent and instead one Dr. R.N. Roy was appointed to the post of Principal. This was the wrong consideration which led to repeated Review DPC on the directions of the Tribunal and ultimately respondent could get the promotion. Had the wrong been not committed in the first instance, the respondent would have got appointment as Principal on the date when Dr. R.N. Roy was appointed to the post of Principal sometime in December 1992 or early in 1993. In this scenario it would be proper to give the arrears of salary and allowances to the respondent as Principal with effect from the date when Dr. R.N. Roy was appointed.

19. We, therefore, allow this writ petition partly and modify the order of the Tribunal by substituting the direction that the respondent be granted the arrears of pay and allowance to the post of Principal or the date when Dr. R.N. Roy was appointed to this

post till 11.8.2002. The arrears of pay and allowance be calculated and differential pay be paid to him after adjusting the actual pay and allowance drawn by him during this period within three months from today and be paid to the respondent. The writ petition is disposed of in the aforesaid terms.

WP (C) 1894/2007

20. In this case the respondent was empanelled for the post of Section Engineer/Sig. Grade Rs. 6500-10500. However, his result was ordered to be kept in sealed cover vide letter dated 25.7.2001 due to the fact that he was served with a charge sheet for major penalty proceedings and was thus facing disciplinary proceedings. On 2.8.2001, the respondent was awarded penalty of reduction to lower stage in time scale of pay for one year with cumulative effect. The appellate authority reduced the punishment by making it "without cumulative effect". On such finalization of departmental case, the result of the respondent for the post of Section Engineer was declared and he was promoted to the said post with effect from 2.8.2001. However, he was given notional seniority from the date his juniors were promoted and did not get the actual salary for the past period. The respondent feeling aggrieved by the punishment awarded to him filed OA before the Tribunal which was allowed and

penalty was quashed on the ground that charge sheet was not issued by the competent authority. Judgment to this effect was rendered on 29.1.2003. However, a liberty was granted to the petitioners to take fresh proceedings against the respondent in accordance with law. Consequently, a fresh charge sheet dated 23.2.2004 was served upon the respondent. While the departmental proceedings were pending, the respondent filed another OA No. 739/2005 impugning orders dated 26.9.2003 and 23.3.2004 whereby the petitioner, though given promotion with effect from 2.8.2000, was denied the benefit of arrears of pay. This has been allowed by the Tribunal vide impugned judgment dated 7.12.2006. The contention of the Union of India/petitioner was that as the respondent had not discharged the duties and responsibilities of the higher post as per P.S.12654/03 dated 16.7.2003, the claim of the respondent was rightly turned down. This contention has not been accepted by the Tribunal having regard to the judgment of Supreme Court in ***State of A.P. v. K.V.L. Narasimha Rao & Ors. (supra)*** as well as other judgments of the Tribunal on this aspect.

21. In this case we have not to go into the various principles laid down by the Supreme Court in the judgments noted above as there is specific provision in the Indian Railway Establishment Manual which governs such situations. Para 228 is the said provision which

reads as under:-

“228. Erroneous Promotions – (I). Sometimes due to administrative errors, staff are over looked for promotion to higher grades could either be on account or wrong assignment of relative seniority of the eligible at the time of ordering promotion or some other reasons. Broadly, loss of seniority due to the administrative errors can be of two types:-

- i. Where a person has not been promoted at all because of administrative error, and
- ii. Where a person has been promoted but not on the date from which he would have been promoted but for the administrative error.

Each such case should be dealt with on its merits. The staff who have lost promotion on account of administrative error should on promotion be assigned correct seniority vis-à-vis their juniors already promoted, irrespective of the date of promotion. Pay in the higher grade on promotion may be fixed proforma at the proper time. The enhanced pay may be allowed from the date of actual promotion. No arrears on this account shall be payable as he did not actually shoulder the duties and responsibilities of the higher posts.”

22. Since the respondent is a Railway employee and is admittedly governed by the service conditions contained in Establishment Manual, it is not in dispute that said para is applicable. The Supreme Court had an occasion to consider the implication of this provision in ***Union of India & Anr. vs. Tarsem Lal & Ors. – 2006 (9) SCALE 485*** setting aside similar views taken by the Tribunal as taken in the instant case. Taking note of its earlier judgments, the Supreme Court held that in view of provisions of para 228 even

when the promotion is given belatedly due to administrative errors, the incumbent would not be entitled to the salary and allowances for the earlier period.

23. Having regard to the aforesaid dicta of Supreme Court, we allow this writ petition, set aside the impugned judgment of the Tribunal and dismiss the OA filed by the respondent herein.

WP (C) 12285/2004

24. It is not even necessary to take note of the facts of this case. The respondent herein is also an employee of Railway who was engaged as casual Khalasi in 1981, promoted as Material Chaser on ad hoc basis on 31.5.1989. However, in the year 1995, he was regularized as Casual Labourer. He challenged this action and ultimately got the relief from the Tribunal which directed the Railways to consider his claim for regularization to the posts of Material Clerks by taking into account entire period of continuous service as Material Checking Clerks/Material Clersk/Material Chaser etc. in terms of those orders which were passed in respect of so many similarly situated employees, the petitioner was regularized in

Clerk grade from 28.6.1989 with parity, vide orders dated 22.2.2001 but without payment of arrears. His OA claiming the arrears has been allowed by the CAT vide orders dated 12.4.2004 following the judgment Supreme Court in the case of ***State of A.P. v. K.V.L. Narasimha Rao & Ors. (supra)***. In view of our discussion in WP (C) No. 1894/2007 and having regard to the provisions of para 228 of that Indian Railway Establishment Manual interpreted by the Supreme Court in ***Union of India & Anr. vs. Tarsem Lal & Ors. (supra)***, impugned judgment is set aside and the OA filed by the respondent herein is dismissed. Writ petition is allowed in the aforesaid terms with no orders as to costs.

(A.K. SIKRI)
JUDGE

March 14, 2008
HP/JK

(VIPIN SANGHI)
JUDGE