

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C.) No. 13821/2009**

% **Date of Decision: 16.04.2010**

DEPUTY SECRETARY (SERVICES) & ORS. Petitioners
Through Ms.Anjum Javed, Advocate

Versus

SAROJ KUMARI Respondent
Through None

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

MOOL CHAND GARG, J.

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CM No. 15641/2009

Exemptions allowed subject to just exceptions.

Application stands disposed of.

W.P. (C.) No. 13821/2009

1. By this writ petition the petitioners have assailed the order dated 25.11.2008 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (for short "the Tribunal"), whereby the Tribunal has allowed the OA No. 1166/2008 filed by the respondent and has been pleased to set aside the order dated 19.05.2008.

2. Some of the relevant facts, which are not in dispute, are that the respondent was appointed as a Lower Division Clerk on 24.12.1975,

was promoted as Upper Division Clerk on 15.9.1987 & was eligible for promotion to the post of Head Clerk w.e.f. 3.10.1997. She was, however, not given promotion to the post of Head Clerk, but on completion of requisite number of years in service, she was given second financial upgradation under ACP scheme w.e.f. 24.12.1999. It is not in dispute that ACP benefit was given to the respondent only because she was not promoted to the next higher post of Head Clerk w.e.f. 3.10.1997. Realizing their mistake in not promoting the respondent, the petitioners passed an order on 7.2.2007 promoting her notionally w.e.f. 3.10.1997. She was not to be given any salary of the promotional post. By the same order, the second financial upgradation granted to the respondent w.e.f. 24.12.1999 was withdrawn and recovery was sought to be made from her. Aggrieved of the order aforesaid, the respondent filed OA No. 2133/2007, which was disposed of by the Tribunal on 21.4.2008. Operative part of the said order reads as under:-

4. At this stage, while setting aside the order dated 30.12.1997, we direct the respondents to deal with the case of the applicant afresh and find out as to what relief can be given to her. We are not making any final decision in the matter and only observing prima facie that it is not permissible for the respondents to withdraw the ACP and make recovery by promoting the applicant as Head Clerk only notionally. We, however, leave this matter open for debate and direct the respondents to take conscious decision on the matter by applying their mind, and if the applicant may not be entitled to any of the relief in view of the respondents, proper reasons would be assigned for the same. It goes without saying that if the applicant does not get any relief, it will be open to her to file a fresh application.

3. Pursuant to the aforesaid direction given by the Tribunal the petitioners passed the impugned order dated 19.5.2008. While dealing with non-promotion of the respondent at the relevant time, in paragraph 2 of the order aforesaid, it has been observed that her case could not be placed before the DPC for consideration for promotion to the post of Grade-II (DASS) along with her juniors, as she was not assigned seniority in Grade-III (DASS)/UDC, and that seniority No.5565A was inserted vide letter dated 29.9.2004 under physically handicapped category, and further that on assigning seniority in Grade-III (DASS) her case was taken up for promotion to the post of Grade-II (DASS). It has been further observed that on receipt of requisite information/documents, the case of the respondent was placed before review DPC, which recommended her 'fit' for promotion notionally w.e.f. 3.10.1997 i.e. the date of promotion of her juniors in Grade-III (DASS) to the post of Grade-II (DASS) and orders to that effect were issued on 7.2.2007. However, the respondent was not given the arrears for the period from 3.10.1997 to 7.2.2007 on the ground that she did not work physically as Grade-II (DASS) Head Clerk w.e.f. 3.10.1997.

4. With regard to second financial upgradation and withdrawal of the same, it has been observed that the respondent was granted second financial upgradation under ACP scheme w.e.f. 9.8.1999 vide order dated 6.10.2004 as she had not been granted second promotion, and that as the respondent had been granted second promotion notionally

w.e.f. 3.10.1997 i.e. prior to grant of second financial upgradation on completion of 24 years' service, the screening committee/DPC reviewed the matter and recommended to withdraw the second financial upgradation granted to her and accordingly the same was withdrawn vide order dated 30.3.2007. It is then observed that the ACP orders dated 6.10.2003 clearly stated that "the grant of high pay scale is subject to the undertaking that in the event of over payment, which may be detected at a later stage, the same may be recovered from their pay". It is further observed that the clarification provided under ACP guidelines vide DOP&T OM dated 10.2.2000 envisages that the "cases where the ACP Scheme has already been implemented shall be reviewed/rectified if the same are not found to be in accordance with the scheme/clarifications". It has also been observed that as per provisions contained in FR 17(1), an employee shall begin to draw the pay and allowances attached to his/her tenure of a post with effect from the date when he/she assumes the duties of that post. It has also been mentioned that number of employees have been promoted notionally from retrospective dates and they were given arrears of pay and allowances for the periods they actually performed duties of the promoted posts.

5. The Tribunal after considering the reply filed on behalf of the petitioners to the original application filed by the respondent against the order dated 19.5.2008 held that the actions of the petitioner cannot be sustained for the following reasons:-

6. It remained undisputed during the course of arguments that there was no earthly reason so as not to promote the applicant when persons junior to her were promoted. To a pointed question to the learned counsel representing the respondents as to why name of the applicant was inserted in the seniority list on a later date, and as to who was at fault for not incorporating her name in the seniority list at the relevant time, no answer is forthcoming. The respondents are totally silent with regard to reasons for inserting name of the applicant in the seniority list later in point of time. In the circumstances mentioned above, a firm finding of fact can be recorded that the applicant was wrongly ignored in the matter of promotion. She was, in fact not even considered for promotion. When the fault may be totally attributable to the employer in ignoring or not considering an employee for promotion provisions of FR 17(1) relied upon by the respondents, would not be applicable. The employer cannot withhold, stall or deny an employee's promotion without giving any reason whatsoever, and yet plead that whenever the employee may be promoted he/she would get emoluments of the promotional post only from the date when he/she may physically occupy the post. The stand taken by the respondents is totally iniquitous and deserves to be severely condemned. It is a case where the applicant has been cut at both hands. Whereas, on the one hand, her rightful claim for promotion has been ignored for more than a decade and when the mistake realized has been rectified, she has been denied wages of the promotional post, while on the other hand, the second financial upgradation under ACP scheme granted to her on completion of 24 years of service, which was granted only because she was not promoted, has been withdrawn from a retrospective date asking the applicant to make over the payment of the ACP scheme for the last so many years. In the circumstances, as mentioned above, the respondents ought to have either promoted the applicant from the date she had indeed been promoted with all back wages and consequential reliefs, or else not to make recovery

of the second financial upgradation given to her. Such were the observations as well made in our order dated 21.04.2008 in O.A. No.2133/2007, even though the same were tentative. Even though, we had left the matter for debate, we were quite sanguine that considering the observations of the Tribunal, the respondents would take a reasonable approach in the matter. That was, however, not to be.

7. In view of the discussion made above, we allow this Application. Impugned order dated 19.5.2008 is set aside. For the untold misery and hardship meted out to the applicant in first not promoting her in due time and making her to work under her juniors for over a decade, and then withdrawing the benefit of second financial upgradation under ACP scheme granted to her from retrospective date and persisting with the said order despite observations made by us in OA No. 2133/2007, we allow this Application with costs quantified at Rupees ten thousand.

6. Counsel for the petitioner was unable to justify creation of a situation where an incumbent who was granted financial upgradation on completion of 24 years as no promotion was granted in the meanwhile; to refund such financial benefits once promotion was granted from a back date without any arrears. In fact, the impugned order which has been set aside by the Tribunal creates a situation where the incumbent despite completion of 24 years of service without promotion would neither be entitled to financial upgradation nor would be entitled to arrears of pay despite her promotion from a back date by invoking provisions of FR 17(1).

7. The petitioners have placed reliance upon FR 17(1) to justify that in such a situation where the incumbent was promoted though

notionally she was neither entitled to arrears of pay for the period for which she did not work and further that she was also liable to refund the financial benefits granted to her on the basis of second financial upgradation under the ACP Scheme. FR 17(1) the sake of reference is reproduced hereunder:-

“F.R. 17. (1) Subject to any exceptions specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties:

Provided that an officer who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence.”

8. However, the aforesaid rule does not come to the rescue of the petitioners inasmuch as they themselves are at fault in creating a situation where on the one hand they failed to promote the respondent within 24 years of her service despite entitlement to be so promoted and, thus, granted her financial upgradation under the ACP scheme. Later on when they have promoted her, they have not only decided to recall the financial benefits but have also taken a decision to ask her to refund the financial benefits granted to her under the ACP scheme. This approach has not been accepted by the judicial precedents. A Division Bench of this Court in *WP(C)No.2747-48/2004* entitled as *Joint Commissioner of Police & Anr. Vs. Dayanand Tyagi* decided on 6.7.2007 has held;

6. Accordingly, this is not a case where the respondent can be said to be held guilty or where he has been visited with any penalty even of censure. The principles laid down in Jankiraman's case would clearly apply. The Supreme Court in the case of K.V. Jankiraman held "we are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/criminal proceedings." It was further held "whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion, and if so to what extent will be decided by the concerned authority by taking into consideration all the facts and circumstances of the disciplinary proceedings/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so."

9. The Apex Court also dealt with a similar situation in the case of Union of India Vs. K.V. Jankiraman, (1991) 4 SCC 109. In this case it has been held;

23. There is no doubt that when an employee is completely exonerated and is not visited with the penalty even of censure indicating thereby that he was not blameworthy in the least, he should not be deprived of any benefits including the salary of the promotional post. It was urged on behalf of the appellant-authorities in all these cases that a person is not entitled to the salary of the post unless he assumes charge of the same. They relied on F.R. 17(1) of the Fundamental Rules and Supplementary Rules which reads as follows:

"F.R. 17. (1) Subject to any exceptions specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect

from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties:

Provided that an officer who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence."

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 inapplicable to such cases.

10. The aforesaid principles are fully applicable to this case. The fault lies with the petitioners themselves in having not promoted the respondent at the relevant time despite her eligibility, which fact has been noted by the Tribunal as stated above. In this case, the petitioners themselves are to be blamed for not permitting the respondent to work at a promoted post by sitting over the matter and by

not sending her matter for consideration to the DPC. Now, they cannot blame the respondent for that. In these circumstances, if the petitioner at the relevant time was granted second financial upgradation under the ACP scheme to the respondent on account of her having completed 24 years as per the policy of the Government, they cannot deprive the respondent of the arrears of pay for the period which she has been promoted or as also the financial upgradation granted to her. In these circumstances, we are of the opinion that the petitioners have abused the process of law and there is no merit in the present writ petition. We do not find such illegality and irregularity, which will entail interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The writ petition is accordingly dismissed.

11. It will be appropriate to notice that the OA was dismissed with a costs of Rs. 10,000/-. In the circumstances, we impose a further costs of Rs. 5000/- on the petitioners payable to the Delhi High Court Legal Services Committee.

CM No.3/2010 (Stay)

In view of the orders passed above, this application has become infructuous and is accordingly disposed of.

MOOL CHAND GARG, J.

APRIL 16, 2010

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ANIL KUMAR, J.