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

Date of decision: May 20, 2013

+ **W.P.(C) 7334/2012**

UNION OF INDIA & ANR. Petitioners

Represented by: Mr.Sanjiv Kumar Saxena,
Advocate for Mr.Ruchir Mishra, Advocate

versus

THANGLALMUON Respondent

Represented by: Mr.K.R.Pamei, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J. (Oral)

1. Promoted as a Tax Assistant vide order dated March 31, 2009 with retrospective effect from August 29, 2008, the respondent started receiving salary in the applicable pay scale of the post of Tax Assistant but raised an issue when in spite of promoting him as a Tax Assistant with retrospective dated from July 07, 2003 benefit was restricted notionally by placing respondent in the said pay scale but denying arrears of pay in the grade applicable. He filed O.A.No.1768/2010 which has been allowed by the Tribunal vide impugned order dated March 01, 2012 directing petitioners to release arrears of pay with effect from July 07, 2003.

2. It is apparent that the petitioners have conceded to the point that the respondent was not promoted in spite of being found entitled to be

promoted. With effect from July 08, 2003 persons found eligible were promoted, but in spite of being empanelled the respondent was not promoted because at that point of time no vacant post of Tax Assistant was notified against which respondent could be promoted i.e. promotions were restricted in the select panel to the vacancies notified. It so transpired that one post of Tax Assistant had been diverted from Delhi Commissionerate to the Directorate of Logistics where the respondent was working and this went unnoticed initially. When the error was detected the respondent was firstly promoted on regular basis and from which date salary in the scale was paid to him. Later on benefit of notional promotion was given but without arrears on the principle of applicability of FIR 17 as per which a person would be entitled to wages to a higher post from the date duties thereof are assumed.

3. Holding in favour of the respondent, the reason given by the Tribunal in para 5 of the impugned decision reads as under:-

“We have heard both the learned counsel and perused the pleadings. Since this is an admitted position that under the restructuring, all the LDCs were to be promoted as Tax Assistant. In normal course, the applicant would also have been promoted as Tax Assistant after the restructuring because he had already passed the computer proficiency test w.e.f. 7.7.2003. However, he was left out in 2003 only because the Commissioner did not send the correct no. of posts of LDC to the Ministry. It is, thus, clear that applicant has been denied his due promotion on account of mistake committed by the respondent no.2. Respondents have already given promotion to the applicant now w.e.f. 7.7.2003 but have denied him the arrears. We are satisfied that since applicant was denied the rightful promotion wrongfully by the respondents, he cannot be denied the arrears on this account. The OA is accordingly allowed.

Respondents are directed to release the balance arrears to the applicant w.e.f.7.7.2003, within a period of two months from the date of receipt of a copy of this order, under intimation to the applicant.”

4. The only question which arises for our consideration is whether in the facts which are admitted is the respondent entitled to arrears of pay with effect from July 07, 2003.

5. The cadre restructuring plan of CBEC envisaged merger of three posts, UDC, DEO (A) and LDC and their re-designation as Tax Assistant. In accordance with the cadre restructuring plan, 12 posts of Tax Assistant (3 UDC + 9 LDC) were required to be allocated to the Directorate of Logistics where the respondent was working. However, as against this, only 11 posts of Tax Assistant were allocated. It appears that the respondent, being the junior most LDC, could not be promoted. Later on, one post of Tax Assistant was diverted to the Directorate of Logistics. On diversion, the respondent was promoted initially with effect from August 29, 2008 and later on with effect from July 07, 2003; the date when he passed the proficiency test. Hence, it is seen that the non-promotion of the respondent was primarily for the reason that there was no post of Tax Assistant available for him. It was only pursuant to the diversion of a post as noted above which resulted in the creation of a post in the Directorate, against which the respondent was promoted. Thus, there is enough justification to give promotion to the respondent only in the year 2009. In fact, it is seen that the petitioners have acted benevolently by giving promotion from a date prior to the date of diversion of the post in question.

6. Thus, the respondent can claim no more and cannot take an advantage from a Court of Law by taking to the logical conclusion an

action which we find to be conferring a wrong benefit upon the respondent.

7. This issue of payment of arrears has been a subject matter of various decision of the Supreme Court. In the decision reported as (1996) 7 SCC 533 State of Haryana v. O.P.Gupta applying the principle of 'No Work No Pay'; relying upon its earlier opinion reported as 1989 2 SCC 541 Paluru Ramkrishnaiah & Ors. v. Union of India & Anr. and 1990 3 SCC 472 Virender Kumar G.M. Nrllys v. Avinash Chandra Chadha, the Supreme Court directed preparation of a fresh seniority list and in compliance promote eligible persons on notional basis from deemed dates but without arrears of pay.

8. In the decision reported as (2003) 7 SCC 238 A.K.Soumini v. State Bank of Travancore & Anr. the Supreme Court, in para 9 observed as under:-

“9. So far as the case on hand is concerned, the appellant was denied promotion in terms of the promotion policy under which it was necessary for a candidate to secure at least minimum eligibility marks of 6 ½ at the interview and the learned Single Judge allowed the claim only on the ground that such prescription of minimum marks was not valid. Though, the Division Bench also affirmed the same, this Court overruled the said decision and upheld such prescription. But taking into account the pendency of the appeal in this Court for a considerable time, and on account of which the appellant also did not appear in the subsequent tests, benefit to promote her was not denied. The fact that her non-promotion was legal and there has been no unlawful interference with her right to promotion or to serve in the promoted category was obvious and could not be minced over or completely ignored in the light of the judgment of this Court, allowing the appeal by the Bank. While that be the position, the grant of relief to her, keeping in view

the delay merely due to pendency of proceedings before court, was more in the nature of a gesture of gratis and not by way of any right, to which she was found to be entitled to. Consequently, the notional promotion given to her by the Bank with suitable revision of her pay scales itself is more than sufficient to meet the requirements, be it either in law or in equity. The further claim for payment of arrears as well is far-fetched and can have no basis in law. The Division Bench, in our view, properly approached the question in the light of the relevant guiding principles and the same could not be said to be either arbitrary, unreasonable or unsound in law to warrant our interference.”

9. In the opinion reported as (2007) 11 SCC 632 Union of India v. B.M.Jha the Supreme Court in para 5 observed as under:-

“We have heard learned counsel for the parties. It was argued by learned counsel for the respondent that when a retrospective promotion is given to an incumbent, normally he is entitled to all benefits flowing therefrom. However, this Court in State of Haryana v. O.P.Gupta’s case (supra) and followed in A.K.Soumini v. State Bank of Travancore has taken the view that even in case of a notional promotion from retrospective date, it cannot entitle the employee to arrears of salary as the incumbent has not worked in the promotional post. These decisions relied on the principle of “no work no pay”. The learned Division Bench in the impugned judgment has placed reliance on State of A.P.v. K.V.L.Narasimha Rao. In our view, the High Court did not examine that case in detail. In fact, in the said judgment the view taken by the High Court of grant of salary was set aside by this Court. Therefore, we are of the view that in the light of the consistent view taken by this Court in the abovementioned cases, arrears of salary cannot be granted to the respondent in view of the principle of “no work no pay” in case of retrospective promotion. Consequently, we allow this appeal and set aside the

impugned order of the High Court dated 17-5-2000 passed by the Division Bench of the High Court as also the order dated 11-1-2000 passed by the Central Administrative Tribunal, Principal Bench”.

10. Even this Court in the opinion reported as 2002 III AD Delhi 264 Amar Singh v. Union of India applying the principle of ‘No Work No Pay’ has held that the action of the Government denying the arrears of pay to an employee cannot be said to be unreasonable. In Para 5 and 6 it was noted as under:-

“5. The petitioner claimed a higher seniority position on the ground that he was drawing higher salary and a higher scale of pay from the date of his initial appointment in the establishment of respondent No.2. On amalgamation of different posts and creation of a new cadre, the petitioner was placed below some of the persons, who were drawing lesser pay scale than him. Consequently, he filed representations before the respondents for re-fixation of his seniority taking into consideration of the fact that he was in a higher grade of pay than the persons who were shown senior to him. The aforesaid contention of the petitioner was rightly found to be justified and accordingly the seniority list was re-drawn. Based on that revised seniority list the review DPC was held. It recommended his promotion from a retrospective deemed date. The issue is because he was given a notional promotion from a retrospective date should he be also paid arrears for the said period.

It is true that the petitioner was not at fault for his inability to actually work in the post of Research Officer from 1992, onwards till 1996 when actually the order of promotion was passed. It is, however, required to be considered that before giving the permission for holding a review DPC the Department of Personnel and Training

*made it explicitly clear that the said permission may be considered for giving notional promotion but the same shall have to be without payment of arrears. Such a decision was conveyed because of clear stipulation in Clause 18.4.3 of the circular issued by the Department of Personnel and Training. A bare reading of the said clause makes it apparent that in case where an injustice is created and a junior person is promoted earlier than the said mistake and injustice shall have to be rectified by giving notional promotion from the date his juniors were promoted. The very purpose of giving notional promotion is to take care of some injustice, inter alia, because some junior has come to be promoted earlier. In this connection, reference may be made to a decision of the Supreme Court in **Union of India v. M.Bhaskar** reported in 1996 (4) SCC 416.*

6. *Clause 18.4.3 of the circular issued by the Department of Personnel and Training makes it categorically clear that if the officers placed junior to the officer concerned have been promoted, the concerned officer should be promoted immediately giving notional promotion from the deemed date when his juniors have been promoted but no arrears would be admissible. When the decision in the present case to give notional promotion, without any arrears, is taken on the basis of the aforesaid mandate of the circular, no fault could be found in the actions of the respondents in not making payment of the arrears to the petitioner. In my considered opinion, the principle of “No Work – No Pay” is also applicable to the facts and circumstances of the present case. While coming to the aforesaid conclusions I am fortified by the decision of the Supreme Court in **State of Haryana & Others Vs. O.P.Gupta**, (1996) 7 SCC 533 wherein also the claim for arrears of pay from the date of notional promotion was rejected as the persons did not actually work in the said posts. The petitioner in the present writ petition has also not challenged the legality of the aforesaid circular, which is in the nature of guidelines and in absence of any statutory rule governing the field, the*

mandate of the aforesaid circular would hold the field.”

11. Thus, denial of arrears of pay to the respondent are fully justified.
12. We allow the writ petition and set aside the order dated March 01, 2012 passed by the Tribunal and dismissed O.A No.1768/2010.
13. No costs.

(V.KAMESWAR RAO)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

MAY 20, 2013
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