

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN

MONDAY, THE 30TH DAY OF MARCH 2015/9TH CHAITHRA, 1937

WP(C).No. 20143 of 2007 (W)

PETITIONER:

M.K.BALAKRISHNA PANICKER, SREE SAILAM,
69 - SANKAR NAGAR, KOLLAM.1

BY ADVS.SRI.N.SUKUMARAN
SRI.S.SHYAM
SRI.N.K.KARNIS
SRI.BOBBYMATHEW KOOTHATTUKULAM

RESPONDENT:

EXPORT INSPECTION COUNCIL OF INDIA,
MINISTRY OF COMMERCE, NEW DELHI, PIN: 110008
REPRESENTED BY ITS DIRECTOR (INSP. & G.C.)

R,R.1 BY ADV. SRI.BABU KARUKAPADATH, SC, GCDA

R1 BY ADV. SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
30-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WPC 20143/2007

PETITIONER'S EXTS:

EXT.P1: TRUE COPY OF THE ORDER OF THE 1ST RESPONDENT DT.28.7.1981

EXT.P2: -DO- JUDGMENT IN CRL.APPEAL NO:80/1983 DT.16.1.1987 OF THE HON'BLE HIGH COURT OF KERALA

EXT.P3: -DO- OF THE ORDER OF THE RESPONDENT DT. 2.9.1988

EXT.P4: -DO- DT.14.9.1990

EXT.P5: -DO- DT.27.6.1990

EXT.P6: -DO- REPRESENTATION SUBMITTED BY THE PETITIONER BEFORE RESPONDENT DT.23.11.1990

EXT.P7: -DO- DT.27.2.1991

EXT.P8: -DO- REPLY TO EXT.P7 ISSUED BY THE RESPONDENT DT.21.8.1991

EXT.P9: -DO- REPRESENTATION SUBMITTED BY THE PETITIONER BEFORE RESPONDENT DT.4.5.1994

EXT.P10: -DO- ORDER OF THE RESPONDENT DT.24.3.1984

EXT.P11: -DO- JUDGMENT OF THE HON'BLE HIGH COURT OF KERALA IN O.P.NO:8554/1995 DT.5.6.1995

EXT.P12: -DO- LETTER FORWARDING EXT.P11 TO RESPONDENT DT.12.7.95

EXT.P13: -DO- POSTAL RECEIPT FOR ISSUING EXT.P12

EXT.P14: -DO- LETTER ISSUED BY THE RESPONDENT DT.8.1.1996

EXT.P15: -DO- JUDGMENT OF THE HON'BLE HIGH COURT OF KERALA DT.15.7.2005 IN O.P.NO: 4119/1996

EXT.P16: -DO- FORWARDING LETTER ISSUED BY THE PETITIONER TO THE RESPONDENT DT.29.8.2005

EXT.P17: -DO- ORDER OF THE RESPONDENT DT.2.1.2006

EXT.P18: -DO- REVIEW PETITION FILED BY THE PETITIONER BEFORE THE RESPONDENT DT.23.4.2007

EXT.P19: -DO- LETTER ISSUED BY THE RESPONDENT TO THE PETITIONER DT.12.5.2006

RESPONDENT'S EXTS:

EXT.R1A: TRUE COPY OF THE OPTION EXERCISED BY THE PETITIONER

EXT.R1B: -DO- COPIES OF THE JUDGMENT DT.12.10.1998

EXT.R1C: -DO- JUDGMENT IN WRIT APPEAL NO:617/2000 DT.29.10.2004

EXT.R1D: -DO- OF THE RECEIPT DT.16.2.2006 EVIDENCING THE ACCEPTANCE
OF THE ENTIRE BENEFITS SANCTIONED TO THE PETITIONER AS PER EXT.P17.

JJ

/TRUE COPY/

P.S.TO JUDGE

K. SURENDRA MOHAN, J.

W.P(C) NO:20143 OF 2007

Dated this the 30th March, 2015.

JUDGMENT

The petitioner was an Assistant Director of the Export Inspection Agency under the respondent. He had issued a certificate of export worthiness to a consignment of cashew in the year 1979. Later on, it was found that some of the tins containing cashew that were sought to be exported were not actually export worthy. Criminal proceedings were initiated against the petitioner as well as the exporters. It was alleged that the petitioner had conspired with the exporters to issue the certificate in order to facilitate export of goods that were not worthy of being exported. As per Ext.P1 proceedings dated 28.7.1981 the petitioner was placed under suspenson. After criminal trial the petitioner was acquitted. The respondent challenged the acquittal of the petitioner in criminal appeal No.80/1983 before this Court. As per Ext.P2 judgment, this Court confirmed the acquittal of the petitioner. The respondent challenged Ext.P2 judgment before the

Hon'ble Supreme Court by preferring a Special Leave Petition against the same. The Special Leave Petition also was dismissed.

2. After dismissal of the criminal appeal by Ext.P2 judgment, by Ext.P3 dated 2.9.1988 the suspension of the petitioner was revoked. By Ext.P4, the departmental action against the petitioner was also closed. Thereafter by Ext.P5 proceedings dated 27.6.1990 the service of the petitioner was regularised, treating the period of his suspension as duty for all purposes. He was permitted to draw full pay and allowances for the entire period of his suspension.

3. In the meanwhile, as per Ext.P10 proceedings dated 24.3.1984 a number of persons had been promoted to the next higher post of Deputy Director. Many of the petitioner's juniors were also promoted. The petitioner had therefore submitted Exts.P6 and P7 representations requesting for the consideration of his claim for promotion also. However, he was informed by Ext.P8 that his case would be considered after finalisation of the criminal appeal that was pending at that time.

4. The petitioner had submitted Ext.P9 representation dated 4.5.1994 after the Special Leave Petition filed by the respondent

was dismissed. He had sought for restoration of the promotion that was denied to him, from the date on which his juniors had been promoted. However, his representation was not considered. Therefore the petitioner approached this Court by filing O.P.8554/1995. The said writ petition was disposed of by Ext.P11 judgment dated 5.6.1995 directing the petitioner's representation to be considered. However, his representation was rejected by Ext.P15. The petitioner challenged Ext.P14 before this Court in O.P. 4119/1996. As per Ext.P15 judgment dated 15.7.2005, Ext.P14 was set aside and the respondent was directed to consider the petitioner's representation afresh.

5. Accordingly, the matter was considered again. Thereafter, Ext.P17 proceedings dated 2.1.2006 was issued granting promotion to the petitioner as Deputy Director (Tech) with effect from 24.3.1984. However, the promotion granted to him was subject to the condition that he shall be eligible for notional fixation of pay for the grant of retirement benefits alone. Since it has been held in Ext.P17 that the petitioner would not be entitled to any pay in the promoted post and that the fixation of his pay would only be for the purpose of his retirement benefits, the

petitioner was aggrieved. Therefore, he submitted Ext.P18 representation dated 24.3.2007 claiming arrears of salary in the promoted post for the period from 24.3.1984 from which date he was granted notional promotion. However, by Ext.P19 his request has been rejected. The petitioner has filed this writ petition challenging Ext.P19.

6. According to Senior Counsel Shri. N.Sukumaran who appears for the petitioner, the petitioner was proceeded against before the criminal courts as well as by way of departmental proceedings, on the basis of allegations that were absolutely baseless. He was placed under suspension from 28.7.1981 onwards, which continued till the suspension was revoked on 2.9.1988. Not satisfied with his acquittal by the criminal court the respondent had challenged the same successively by way of an appeal and by a Special Leave Petition before this Court and the Honourable Supreme Court and had lost. In the meanwhile his juniors had been promoted over him and he was compelled to work under them at considerable mental agony. Since he had been honourably acquitted, he was entitled to be restored, all that he had lost by reason of the proceedings initiated against him. It is true

that by Ext.P17 he has been granted the promotion that was legitimately due to him with effect from 24.3.1984. However, he has not been granted his pay in the post to which he was promoted. According to the learned Senior Counsel, the petitioner had been prevented from working in the promoted post, only by reason the disciplinary proceedings that were pending against, though he had been willing to work. Since he had been kept out of the post entirely due to the action of the respondent, it is contended that he is entitled to be paid his salary also, though he had not actually worked in the post to which he has been granted notional promotion. The learned Senior Counsel places reliance on a decision of the Honourable Supreme court to support his contention that the matter ought to have been considered properly by the authority. In Ext.P19, according to the learned Senior Counsel the claim of the petitioner has not been considered properly. Therefore, it is contended that Ext.P19 is unsustainable and liable to be set aside.

7. A counter affidavit has been filed on behalf of the respondent producing Exts.R1(a) to R1(d) documents. Adv.Babu Karukapadath appears for the respondent. According to the

learned counsel, the petitioner had opted for voluntary retirement under a scheme that was introduced by the Government of India in the year 1990–1991. All the benefits due to the petitioner had been paid, in accordance with the said scheme after the petitioner had opted for voluntary retirement. His application for voluntary retirement is Ext.R1(a) and is dated 18.7.1994. Thereafter, the petitioner had along with a number of other employees who had opted for voluntary retirement approached this Court by filing O.P.4938/1997. The said writ petition was dismissed by this Court by Ext.R1(b) judgment on 12.10.1998. The petitioners had challenged Ext.R1(b) in W.A.617/2000 which was also dismissed by this Court by Ext.R1(c) judgment dated 29.10.2004. The said writ petitions had been filed claiming that the petitioner and others were entitled to be paid pension though the terms of the voluntary retirement scheme stipulated that no pension would be paid to persons who opt for the same. According to the learned counsel, on accepting the terms of the voluntary retirement scheme a fresh contract comes into existence that disentitles such employee from raising any further claim in respect of his service, after his voluntary retirement. The petitioner having foregone all his claims by

opting for the voluntary retirement, it is contended that his present claim cannot be entertained. The counsel also places reliance on Ext.R1(d) receipt to contend that, since the petitioner has received the said amount unconditionally and without protest, no further claim of his is maintainable. The counsel also places reliance on a decision of the Supreme Court to support his contention that a fresh contract comes into existence on an employee opting for a voluntary retirement scheme. Therefore, according to the counsel this writ petition is only to be dismissed.

8. Heard. The facts in this case are not in dispute. The petitioner was admittedly subjected to disciplinary action as well as criminal proceedings alleging that a certificate issued by him was intended to favour an exporter. As already noticed above, the petitioner was acquitted in the criminal proceedings. His acquittal was confirmed by this Court in Ext.P2. Though the respondent had challenged Ext.P2 before the Supreme Court by filing a Special Leave Petition, the same was also dismissed. Thereafter, the suspension of the petitioner was revoked, the disciplinary proceedings against him were dropped and he was permitted to rejoin duty. By Ext.P5, his services were regularised and the period of his suspension was

directed to be treated as duty for all purposes. However, the promotion that was legitimately due to him in 1984 had not been granted. It was for the said reason that the petitioner had submitted Exts.P6, P7 and P9 representations. He also had to approach this Court on two occasions. Finally by Ext.P17 order dated 2.1.2006 the respondent has ordered that he would be granted notional promotion with effect from 24.3.1984. It is worth noticing here that the petitioner had in the meantime opted for voluntary retirement and had gone out of service. His application for voluntary retirement was accepted in July 1994, as evident from Ext.P14 and R1(a). It was long thereafter that the petitioner has been granted notional promotion by Ext.P17 which is dated 2.1.2006. Therefore, the contention that all claims of the petitioner stood barred on the acceptance of his application for voluntary retirement, put forward by the counsel for the respondent cannot be accepted. On their own showing, the respondent has granted the petitioner notional promotion with effect from 24.3.1984 long after his voluntary retirement had been sanctioned.

9. The counsel for the respondent has placed reliance on the decision of the Supreme Court in HEC Voluntary Retd. Employees

Welfare Society and another v. Heavy Engineering Corpn. Ltd. and others [(2006)3SCC 708] to contend that, the voluntary retirement scheme when accepted creates a contract between the employer and the employee, barring all further claims. The said case involved the employees of the Heavy Engineering Corporation Ltd. The employees had opted for a voluntary retirement scheme dated 22.10.1990 and had retired during the period from 1.1.1992 to 31.12.1996. Thereafter there was a revision of the scales of pay of the company. The revision of pay was given retrospective effect from 1.1.1992. The employees who had opted for voluntary retirement also claimed the benefits of the pay revision. The Supreme Court after considering their claims, held that the employees were not entitled to put forward such a claim. This was for the reason that, when the employees accepted the voluntary retirement scheme a new contract came into existence disentitling them from making any claim under the original contract of employment subject to which they had been working till then.

10. The facts in the present case are entirely different. As already noticed above, here is a case where the petitioner had been denied his right to promotion for the reason that disciplinary

proceedings were pending against him. He had sought for restoration of the promotion that had been denied to him because of the pendency of such disciplinary proceedings. His claim has been found to be justified by Ext.P17. It was for the said reason that he has been granted retrospective promotion as Deputy Director (Tech) with effect from 24.3.1984. It is true that the normal rule is “no work no pay”. It is also true that the petitioner has not worked in the post to which he has been granted promotion by Ext.P17. Therefore, in the normal circumstances, he is disentitled from putting forward a claim that he should be paid for the period that he had not worked. However, the Senior Counsel places reliance on the decision reported in Union of India v. K.V.Janakiraman [1991]II LLJ 570 (SC)] where considering a similar question it has been held that the “no work no pay” rule is not one that would apply in all cases with equal force. The Supreme Court has considered the question and has held as follows in the said decision:–

“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.

26. 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. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc. In such circumstances, the concerned authorities must be vested with the power to decide whether the employee at all deserves any salary for the

intervening period and if he does, the extent to which he deserves it.”

11. What emerges from the above dictum is that it is for the respondent to have considered the question as to whether the petitioner was entitled to be paid salary for the period that he had been kept away from the post to which he has been promoted by Ext.P17. It cannot be disputed that he was prevented from working in the said post, due to no fault of his. Therefore, it is necessary that his claim is considered in the light of the dictum of the Hon'ble Supreme Court extracted above. A perusal of Ext.P19 shows that the petitioner's claim has been rejected summarily, without any worthwhile consideration.

In view of the above this writ petition is allowed. Ext.P19 is set aside. The respondent is directed to consider the petitioner's claim for pay in the post to which he has been promoted by Ext.P17 and to pass appropriate orders in the matter within a period of three months of date of receipt of a copy of this judgment.

Sd/-
K. SURENDRA MOHAN
Judge

