

THE HON'BLE SRI JUSTICE P. NAVEEN RAO

WRIT PETITION (TR).No.62 OF 2017

Dated:21.06.2017

Between:

Syed Habeebuddin, S/o. Syed Suleman,
Aged about 63 years, Retired Assistant
Supply Officer, Promoted as D.S.O. as per
APAT Order, R/o.13-6-431/D/2,
Moghal Nagar, Ring Road, Hyderabad .. Petitioner

AND

The Government of Andhra Pradesh
Consumer Affairs, Food and Civil Supplies
Department, rep., by its Ex-Officio Secretary
To Government of Andhra Pradesh,
Secretariat, Hyderabad and others .. Respondents



The Court made the following:

THE HON'BLE SRI JUSTICE P. NAVEEN RAO**WRIT PETITION (TR).No.62 OF 2017****ORDER:**

Petitioner retired from service, while working as Assistant Supply Officer. He is aggrieved by denial of pay and allowance for the period for which he was granted notional promotion by virtue of the orders in G.O.Rt.No.113, Consumer Affairs, Food & Civil Supplies (CS.II) Department, dated 03.11.2011. Petitioner was earlier granted promotion as Deputy Tahsildar (Civil Supplies) on 07.06.1982. His junior was promoted as Assistant Supply Officer on 04.04.1989 and as District Supply Officer on 08.04.1993. Petitioner was denied promotions, while junior was granted promotion on the ground that disciplinary proceedings initiated against him resulted in imposing punishment of stoppage of two annual increments with cumulative effect by order dated 03.09.2003. On consideration of mercy petition, treating the same as second review, by order dated 23.01.2006 punishment imposed against the petitioner was set aside. After setting aside the punishment imposed, petitioner submitted representation praying to regularise the suspension period from 20.07.1986 to 06.07.1989 as on duty. This was initially rejected. However, on review, the Government directed to treat the said period as on duty. Later, petitioner submitted representation for grant of notional promotion on par with his immediate junior. The Departmental Promotion Committee rejected the request of the petitioner for grant of notional promotion as Assistant Supply Officer/District Supply Officer on par with his junior on the ground that charges were not dropped on merits, but were dropped only on mercy grounds.

Aggrieved thereby, petitioner filed O.A.No.862 of 2010 before the Andhra Pradesh Administrative Tribunal, Hyderabad.

2. By order dated 06.04.2010, the Tribunal allowed the said O.A. and declared that consequent to setting aside the punishment, petitioner is entitled to notional promotion to the post of Assistant Supply Officer w.e.f. 04.04.1989 and to the post of District Supply Officer w.e.f. 08.04.1993 and consequential monetary and attendant benefits. The Tribunal further directed that as the petitioner retired on 31.08.2006, his pensionary benefits, which were already fixed, were to be re-fixed notionally w.e.f. 04.04.1989 in the cadre of Assistant Supply Officer and w.e.f. 08.04.1993 in the cadre of District Supply Officer.

3. In compliance with the directions of the Tribunal, the Government constituted review Departmental Promotion Committee, which recommended the petitioner for promotion from the dates as noted above. As it was likely to affect the persons who were earlier granted promotions, show cause notices were issued and on due consideration of their objections, final orders were passed in G.O.Rt.No.113, dated 03.11.2011. By the said orders, the Government accorded permission to the Commissioner of Civil Supplies to reject the objections raised by the juniors and to assign notional seniority and notional promotion to the petitioner as Assistant Supply Officer and District Supply Officer from the respective dates, as mentioned above. The Commissioner passed consequential orders on 08.11.2011 granting the said benefits. However, petitioner was informed that his pay would be fixed notionally in the cadre of Assistant Supply Officer and District

Supply Officer from the respective dates in accordance with F.R.26 (aa). In this Writ Petition, petitioner challenges the said decision of the Government and the Commissioner restricting grant of physical benefits only from the date of actual working and denying him the benefits from the respective dates of his promotion in the cadre of Assistant Supply Officer and District Supply Officer.

4. Learned counsel for the petitioner submits that consequent to successfully persuading the Government to set aside the punishment, it is now clear that petitioner was illegally denied promotion when it was due and therefore he is entitled to all benefits flowing out of setting aside punishment including arrears and allowances for the period for which he was earlier denied promotion. He submits that F.R. 26 (aa) is not attracted, whereas F.R.22 B is attracted in case of the petitioner.

5. Opposing the claim of the petitioner, the stand of the respondents in the counter affidavit is as petitioner did not physically work in the higher posts from the respective dates from which was granted notional promotion, he is not entitled to claim the benefits of pay and allowances for the notional period. In support of their decision, the respondents placed reliance on F.R.26 (aa).

6. By placing reliance on F.R. 26 (aa) and the precedent decisions, learned Government Pleader for Services submits that the petitioner's claim is not valid and he is not entitled to monetary benefits with retrospective dates.

7. The facts noted above are not in dispute. Petitioner was earlier denied promotion when his junior was granted promotion on the ground that he suffered punishment. Even though the punishment was set aside, petitioner was denied promotions from the dates on which his juniors were promoted ignoring him. Consequent to the judgment rendered by the Tribunal, the notional promotions in the cadre of Assistant Supply Officer and District Supply Officer on par with his juniors are granted.

8. The only issue remains for consideration is, whether the petitioner is entitled to claim pay and allowances for the notional period of service consequent to grant of promotion with retrospective date though he did not discharge his duties and responsibilities in those two posts for that notional period.

9. This aspect of payment of appropriate benefits, consequent to grant of notional promotion, is governed by F.R.26 (aa). It reads as under:

“F.R.26 (aa): The pay of a Government servant whose date of seniority/promotion has been revised and fixed from an earlier date, pay may be refixed on the basis of notional duty in the post from time to time. For this purpose, the periods for which the Government servants concerned would have officiated in the higher post if he had been promoted actually on that date may be reckoned on weightage for only such period given from the notional date or promotion. The non-qualifying periods like extraordinary leave, suspension, etc., should also be deducted from this period.

Note 1: Monetary benefit arising out of refixation as above, shall be limited to the duty periods and arrears shall be payable only for the periods during which the Government servant actually discharged the duties of the post. Arrears shall not be payable for the notional duty periods assigned as a result of revision of seniority position.

Note 2: While a Government servant who is already promoted before the revision of his seniority and who is assigned an earlier date of promotion, shall be allowed arrears resulting from the pay fixation, in manner set out in Note 1 above for the periods during which he actually discharged the duties of the post and in the case of a Government servant who has been promoted before the revision of seniority but is promoted after the review, he shall be allowed monetary benefit of pay fixation from the date of promotion only.

Note 3: In the case of Government servant who has already retired or died before the revision of his seniority and fixation of pay, the arrears shall be payable in the manner indicated in Note 2 above, and the pensionary benefits shall also be revised on the basis of the notional pay fixation in the manner indicated in Note (2) above and the monetary benefit of Pension/Family Pension or Death-cum-retirement gratuity as the case may be, shall be allowed from the date of retirement/death.

Note 4: In regard to selection grades, the position is that if by virtue of revised seniority Government servant concerned is to be allowed selection grade scale, it may be allowed with arrears if duties have been discharged in the normal grade of that post. In the case of those who lost their seniority, however, their pay is brought down to the ordinary scale from the original date, their pay fixed in the ordinary scale of pay, ignoring the intervening appointment to selection grade and the correct rate of pay so properly fixed in the ordinary scale, is to be allowed from the date of issue of the orders.”

10. A close reading of F.R. 26 (aa) makes it very clear that an employee in whose favour there is revision of seniority/promotion from retrospective date, the employee is entitled to determination of service only, but is not entitled to claim pay and allowances attached to the higher post for the notional period consequent to the promotion granted with retrospective date. In **State of Andhra**

Pradesh v. K.V.L. Narasimha Rao¹, F.R. 26 (aa) was upheld by the Supreme Court.

11. F.R.22 B is applicable in the normal circumstances when a person starts discharging duties and responsibilities in higher post either by way of promotion or otherwise than the duties and responsibilities earlier discharged by him. In other words, F.R.22 B is attracted only when normal promotion is granted and the employee starts discharging his duties and responsibilities attached to the higher post, whereas F.R. 26 (aa) deals with specific contingency, as in the instant case, when such promotion was granted from retrospective date but the employee did not discharge higher duties and responsibilities for that period. Thus, the distinction is clearly discernable and these two provisions operate independently in two different contingencies. As noted above, the case on hand is covered by the provision in F.R. 26 (aa).

12. Even otherwise, the principle of law is well settled that a person cannot claim pay and allowances for a period for which he did not discharge duties and responsibilities. He is entitled to claim notional benefits for the purpose of future fixation of pay and allowances.

13. In **Union of India v. B.M. Jha**² on consideration of the earlier decisions, the Supreme Court held 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

¹ (1999) 3 SCC 205

² (2008) 2 SCC (L&S) 399

Court in the case of State of Haryana & Ors. V. D.P. Gupta & Ors., [(1996) 7 SCC 533]] and followed in the case of A.K. Soumini v. State Bank of Travancore JT (2003) 8 SC 35 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 the case of State of Andhra Pradesh v. K.G.L. Narasimha Rao & Ors., (1999) 3 SC 205. 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 above-mentioned 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 17.05.2000 passed by the Division Bench of the High Court as also the order dated 11.01.2000 passed by the Central Administrative Tribunal, Principle Bench.”

(emphasis supplied)

14. Furthermore, the petitioner earlier filed O.A.No.862 of 2010 when he was denied promotion from retrospective date. While upholding the claim of the petitioner for retrospective promotion from the dates when promotions were granted to his junior, the Tribunal categorically held that his pay should be re-fixed notionally w.e.f. 04.04.1989 in the cadre of Assistant Supply Officer and w.e.f. 08.04.1993 in the cadre of District Supply Officer. This decision of the Tribunal has become final. In terms thereof, petitioner is only entitled to notional benefits, but not physical benefits. Having invited an order from the Tribunal, the petitioner cannot turn around and claim higher benefits.

15. For the aforesaid reasons, I see no merit in the Writ Petition (TR) and the same is liable to be dismissed. The Writ Petition (TR) is accordingly dismissed. There shall be no order as to costs.

Miscellaneous Petitions, if any, pending in this Writ Petition (TR) shall stand closed.

P. NAVEEN RAO, J

Date:21.06.2017

KH

