

Court No. - 34**Case :-** WRIT - A No. - 36243 of 2011**Petitioner :-** Union Of India Through General Manager, North Eastern Railway Gorakhpur and Others**Respondent :-** Watson Nirmal Lal And Another**Counsel for Petitioner :-** A.K.Gaur**Counsel for Respondent :-** Sarita Shukla,Raj Kumar Shukla,S.C.**Hon'ble Sudhir Agarwal,J.****Hon'ble Rajeev Misra,J.**

1. By means of present writ petition filed under Article 226 of Constitution of India, petitioners have challenged judgement and order dated 3.2.2011, passed by Central Administrative Tribunal (hereinafter referred to as 'Tribunal'), Allahabad Bench, Allahabad in Original Application (hereinafter referred to as 'O.A') No. 888 of 2008 (Annexure No.5 to writ petition), whereby Tribunal has allowed above mentioned O.A preferred by applicant-respondent and further directed to fix seniority of applicant-respondent in accordance with rules and re-fix seniority position of applicant-respondent in seniority list. Further direction issued is to permit applicant-respondent to participate in the suitability test for the post of Senior Technician in the scale of Rs. 5000-8000. Lastly directions for payment of arrears of proforma salary from the date juniors to applicant-respondents were promoted has also been issued.

2. We have heard Sri. A.K. Gaur, learned Senior Advocate, assisted by Sri Om Prakash, learned counsel for petitioners and Ms. Sarita Shukla, learned counsel for applicant-respondent.

3. Perusal of record shows that applicant-respondent was appointed on the post of carriage Khalasi in North-Eastern Railway, Varanasi (hereinafter referred to as 'N.E.R') Division, Varanasi on 20.12.1969.

4. Applicant-respondent is alleged to have misbehaved with senior Fuel Inspector while he was conducting inspection on 14.12.1984. Consequently, applicant respondent was placed under suspension vide order dated 15.12.1984. Departmental proceedings were initiated against him. A charge-sheet dated 2.2.1985 was issued alleging that on 14.12.1984 when Additional Fuel Inspector S.K. Das was examining Fuel records at Siwan, applicant-respondent misbehaved with aforesaid officer which is contrary to Railway Servants Conduct Rules.

5. In the departmental Enquiry, charge levelled against applicant-respondent was held proved and accordingly applicant respondent was imposed punishment of removal vide order dated 1.7.1985. Applicant respondent preferred appeal before Appellate Authority against order dated 01.07.1985, which was partly allowed vide order dated 25.9.1985. Appellate Authority concluded as follows:

*“Sri W.N. Lal met me yesterday. I have carefully gone through the entire case records and also carefully listened to what he had to say during the interview which appeared to me merely reiteration of what is stated in the appeal. On perusing his personal file, I have come to the conclusion that the penalty imposed on him is justified. However, keeping in view his pitiable condition, I examined the matter sympathetically and I have decided that he **should be appointed on the post of Carriage Khalasi as a fresh incumbent at the minimum of scale of pay for a period of one year during which period his performance shall be kept under observation and quarterly reports shall be submitted so that a decision on his continuation beyond the period of one year can be taken**”* (Emphasis added)

6. Dissatisfied with appellate order dated 25.9.1985, applicant respondent filed O.A. No. 87 of 1988 (Watsun Nirmal Lal Vs. Union of India and Others). Same was allowed by Tribunal vide judgement and order dated 21.9.1995, whereby order of Appellate Authority dated 25.9.1985 was quashed and matter was remanded to Appellate Authority with a direction to redecide appeal within a period of three months from date of communication of order dated 21.9.1995.

7. Pursuant to aforesaid order dated 21.9.1995 passed by Tribunal, Appellate Authority re-decided appeal vide order dated 30.7.1998.

Appellate Authority this time allowed appeal filed by applicant-respondent, set aside order dated 1.7.1985 passed by Disciplinary Authority but awarded 'Censure'.

8. Order dated 30.7.1998, passed by Appellate Authority attained finality for want of further challenge by applicant-respondent.

9. Thus, applicant-respondent remained under litigation from 4.7.1985 to 30.7.1998. Subsequently, vide order dated 23.9.1999, seniority of applicant-respondent was revised. Thereafter, vide order dated 16.4.2000, he was promoted on the post of Carriage Fitter, Grade-III, followed by promotion on the post of Carriage Fitter Grade-II on 1.7.2003 and ultimately, on the post of Carriage Fitter Grade-I on 30.9.2005. As applicant-respondent was not granted promotion with notional effect from the date juniors to him were promoted nor paid arrears of salary upon notional promotion with retrospective effect nor his seniority position was correctly placed in seniority list and also not called for considering his suitability in senior technical grade which carried a pay scale to Rs. 5000-8000/- accordingly, he approached Tribunal by filing above mentioned O.A. seeking following relief:

"(a) To direct the respondents to fix the seniority of the applicant in accordance with order dated 23.3.1999 (Annexure-4 to compilation No. II) and the exact seniority position of the applicant in the seniority list.

(b) To direct the respondents to permit the applicant to participate in the suitability test for the post of Senior Technician in the scale of Rs. (5000-8000) for which the applicant was illegally deprived by the respondents in view of seniority of the applicant.

(c) To direct the respondent no.2 to make arrears of proforma salary of proforma promotion of the applicant by virtue of his exoneration of the applicant from punishment of removal of service and finally inflicting upon him the only punishment of censure.

(d) The Hon'ble Tribunal may grant any relief which may deem fit and proper under the facts and circumstances of the case.

(e) Award the cost to the applicant."

10. Case set up by applicant before Tribunal was primarily to the effect that he was placed below Ram Nath Ram and above Bechan Ram in seniority list. Ram Nath Ram is placed at Serial No. 232 whereas Bechan Ram was placed at Serial No. 235 and applicant-respondent was placed in

between them i.e. at Serial No. 234. Applicant-respondent was ultimately awarded 'Censure' vide order dated 30.7.1998. Award of 'Censure' is not a punishment, Applicant respondent remained under litigation from 4.7.1985 to 30.7.1998. Junior to applicant-respondent namely, Bechan Ram was promoted on the post of Carriage Fitter Grade-III in the year 1987, whereas applicant respondent has been promoted on the aforesaid post vide order dated 16.4.2000. Thus, applicant-respondent is liable to be granted benefit of notional promotion with retrospective effect along with arrears of pay from the date junior to him was promoted. Applicant-respondent further contended that his seniority position has not been corrected and now he has been placed below Annuddin, which is illegal. Promotions were made from the post of Carriage Fitter Grade-I to Senior Technician in the pay scale of Rs. 5000 to 8000/- but applicant-respondent was not considered.

11. Claim petition filed by applicant-respondent was contested by petitioners. According to petitioners, claimant-respondent is not entitled to reliefs prayed for. In the departmental proceedings initiated against him, applicant respondent was not completely exonerated but awarded minor punishment of 'Censure'. Consequently, by virtue Railway Board's letter dated 29.4.1993, claimant-respondent was not given promotion from the date junior to applicant-respondent was granted promotion. It was further pleaded that seniority of applicant-respondent has already been revised vide order dated 23.9.1999. His seniority position has been fixed and he has been rightly placed above Abdul Fareed. Applicant-respondent is not entitled to the benefit of proforma promotion. No person of general category who was junior to applicant-respondent was called in selections for the post of Senior Technician Grade-I.

12. Claimant-respondent filed a rejoinder affidavit whereby he denied the averments made in counter affidavit and rejoined the averments made in O.A.

13. Upon consideration of pleadings and documents brought on record,

Tribunal observed that seniority of applicant respondent was below Ram Nath Ram and above Bechan Ram. Ram Nath Ram was at Serial No. 232, Bechan Ram was at Serial No. 235 and applicant was at Serial No. 234. Applicant remained under litigation from 4.7.1985 to 30.7.1998. Applicant respondent was awarded 'Censure' vide order dated 30.7.1998. However, 'Censure' is not a punishment. Consequently, applicant respondent was entitled to be promoted from the post of Carriage Khalasi to the post of Carriage Fitter Grade-III in the year 1987, when aforesaid benefit was extended to Bencan Ram, Junior to applicant-respondent.

14. Tribunal further concluded that Railways alleged that applicant respondent has been granted benefit of proforma seniority from the date of his removal from service i.e. 4.7.1985 but fixation of salary has not been finalized till date, as same is pending with accounts department. Applicant respondent was wrongly placed below Annuddin in the seniority list, even when he was senior to him. As such, his seniority position is liable to be corrected and arrears of proforma salary are liable to be paid.

15. Tribunal further held that Divisional Railway Manager (Personnel) issued a letter dated 12.10.2006 for making promotions of Carriage Fitter Grade-I to the post of Senior Technician in the pay scale of Rs. 5000-8000/- on the basis of suitability test. In the aforesaid exercise for promotion, 23 vacancies were earmarked for general category, six for SC and one for ST candidate. In all, 30 vacancies were advertised. Trade test was conducted on 27.11.2006 and the criteria fixed was that candidate should be of long standing and not working on contractual basis, should be in highly skilled category in which quality and capacity to work both would be inclusive. Second criteria fixed was that performance of candidate recommended for post of senior technician would be watched and examined by departmental committee.

16. To achieve aforesaid objective, two groups were constituted. First group was to be tested first and in case candidate of first group fail or did

not get their consent for test, only then the test of second group was to be conducted. In the first group, juniors to applicant-respondent were included and name of applicant was placed at Serial No. 22. Applicant respondent was placed in the second group and in case candidates of first group would have been successful in the test, then candidates in second group was not to get opportunity to undertake suitability test.

17. On the aforesaid findings, Tribunal allowed O.A. filed by applicant-respondent and further issued directions granting benefits to applicant-respondents, which we have already referred to above.

18. Learned Senior Counsel Sri. A.K. Gaur has challenged judgement and order passed by Tribunal by submitting that same is manifestly illegal and therefore liable to be quashed. According to learned Senior Counsel, it is an undisputed fact that departmental proceedings were initiated against applicant-respondent. Ultimately, Appellate Authority vide order dated 30.7.1998 awarded 'Censure' to applicant-respondent. As such, applicant respondent was not fully exonerated in departmental proceedings. Therefore, by virtue of Railway Board's letter dated 29.4.1993, Railways were justified in not granting notional promotion as well as arrears of salary upon notional promotion to applicant-respondent. He also submits that as applicant-respondent has not worked on the post of Carriage Fitter Grade-III from 1987-2000 as such, there is no justification for awarding proforma arrears of salary to applicant-respondent on the Principle of 'no work no pay'.

19. Censure entry was awarded to applicant-respondent vide order dated 01.07.1985 passed by Appellate Authority. Juniors to applicant-respondent were granted promotion in the year 1987. Applicant-respondent filed O.A. before Tribunal in the year 2008. As such, censure entry awarded to applicant-respondent has lost its efficacy when matter came to be considered by Tribunal in the year 2013. Therefore, learned Senior Counsel, Mr. A. K. Gaur is not right in submitting that no fault can be attributed to applicant-respondent in not granting notional promotion to

applicant-respondent.

20. The question as to when principle of "no work no pay" would apply, has been considered in catena of decisions. Initially, the courts were of the view that once it is found that employee was wrongly denied such salary, he is entitled for entire arrears irrespective of the fact whether he actually discharged duties of the post or not. There was a dichotomy of judicial pronouncements in the matters dealing with labour cases and those dealing with government service, inasmuch as, in labour matters since power of discretionary relief was conferred upon adjudicatory forum under the labour laws, the issue was decided in the light of such provisions and the facts and circumstance of concerned case but in the matter of government servants, initially the courts allowed arrears of salary virtually as a matter of course once it is found that such denial was inconsistent to law, but, subsequently it was noticed that failure on the part of authorities in observance of or strict compliance of statute was more frequent then desired and consequence of allowing arrears as a matter of course was so drastic that huge public money used to be siphoned off to such employees who have rendered no public duty or have not actually shouldered any responsibility of higher post and therefore, necessity arose to have a balance in two situations so as not to waste public money for the follies of authorities ,who were under the obligations to observe certain procedure, norms and failure whereof may not enrich certain employees being against the interest of public exchequer but simultaneously interest of employees, who were not at fault, was also to be observed. This gave occasion to consider the question of arrears of salary not as a matter of right, but in each case depending upon multifarious reasons and factors which, this Court will be discussing later on.

21. Here, at this stage, this Court propose to refer some of the judgments throwing light on the discussion made hearinabove.

22. In **P.S. Mahal Vs. Union of India**, AIR 1984 SC 1291, while deciding the dispute pertaining to seniority, Apex Court directed the employees to be treated as deemed promoted from retrospective date and also directed for payment of salary of higher post for the past period. However, in **Paluru Ramkrishnajah and others Vs. Union of India & another**, 1989 (2) SCC 541, despite allowing promotion with back date, the back wages were denied for the reason that earlier in other matters, certain writ petitions were allowed by the Hon'ble Madhya Pradesh High Court on 4.4.1983 following the Apex Court judgment dated 2.2.1981 in Civil Appeal No. 441 of 1981 wherein back wages were denied despite retrospective promotion and a Special Leave Petition Civil No. 5987-92 of 1986 filed by the Government of India against the judgment of Hon'ble Madhya Pradesh High Court was dismissed on 28.7.1986 therefore the Court took the view that same relief should be granted to the appellant in **Paluru Ramkrishnajah (Supra)** also.

23. Subsequently relying on **P.S. Mahal (supra)**, arrears of salary on account of back dated promotions was claimed but the aforesaid dictum was not followed in **Virender Kumar Vs. Avinash Chadha and Ors.**, AIR 1991 SC 958 and for denying arrears of salary to the employees, who were allowed promotion from earlier date, Apex Court gave following reasons:- "1. Deemed appointments have to be given to the concerned employees even from the dates when they were not in service and probably when they were still in their schools and colleges. 2. Neither equity nor justice is in favour of the respondents to award them emoluments of higher posts with retrospective effect and the decision in **P.S. Mahal (Supra)** was distinguishable. 3. The matter was agitated in 1972 but remained pending for more than one and half decade for no fault of the employer. 4. The higher posts were not vacant during the entire period and were manned by others. The employer had paid the incumbents who were working on the higher post, emoluments of the said posts 5. The employees have not actually worked in the higher post and

on the principle of "no work, no pay", were not entitled for higher salary." In the aforesaid case, therefore, on the facts and circumstances of the case, as referred above, the employees were denied arrears of salary despite allowing promotion from an earlier date.

24. In **Union of India Vs. K.V. Jankiraman, AIR 1991 SC 2010**, validity of a Government Order came up for consideration, which provided that during pendency of disciplinary or criminal proceedings, when an employee is to be considered for promotion, his matter shall be kept in sealed cover and he shall not be allowed actual promotion even if selected, till disciplinary/criminal proceeding is finalized and only after conclusion of such proceeding, sealed cover shall be opened and if he is to be promoted, no arrears of salary shall be paid. The validity of this Government Order to the extent it denied arrears of salary to employee against whom, as a result of departmental inquiry or criminal proceedings, nothing ultimately was proved and who was exonerated and found entitled for promotion from due date yet arrears denied, came up for consideration and it was contended that this gives a leverage to the employer to take advantage of his own wrong and despite the fact that employee is not at fault and has done everything possible and permissible, yet he cannot get arrears of salary for an act for which employer is solely responsible and therefore, such provision is arbitrary. A Full Bench of Central Administrative Tribunal declared aforesaid part of Government Order violative of Articles 14 and 16 of Constitution. The matter came up in appeal before a three Judges Bench of Apex Court, which held that FR 17 would not be applicable to a case where employee though is willing to work is kept away by authorities for no fault of his. The court held:

"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"

25. The Apex Court, expressed its agreement with finding of Tribunal that

when an employee is completely exonerated, meaning thereby that he is not found blameworthy in the least and is not visited with penalty even of censure, he has to be given benefit of salary of higher post alongwith other benefits from the date on which he would have been normally promoted but for disciplinary/criminal proceedings. However, Apex Court further held that in such matters, a discretion must be left to employer to decide whether entire salary is to be paid or not, for the reason that there may be cases where proceedings, whether disciplinary or criminal, were delayed at the instance of employee or clearance in disciplinary proceeding or acquittal in criminal proceeding is with benefit of doubt or on account of non availability of evidence due to the acts attributable to employee etc. The concerned authority therefore, must be vested with power to decide whether employee at all deserves any salary for intervening period and if he does, the extent to which he deserves it. The Apex Court further held that it is not possible to anticipate and enumerate exhaustively all circumstances under which such consideration may become necessary but to ignore such circumstances when they exist, however, and lay down an inflexible rule of payment of arrears once an employee is exonerated would undermine discipline in the administration and jeopardize public interests. Thus, legal exposition as laid down in **K.V. Jankiraman (Supra)** is where an employee is not guilty of being away from work but is prevented from doing so by authorities, normal rules of "no work, no pay" is not applicable but in such cases considering various complexities of life and history of proceedings etc., departmental authority must decide entitlement of Government servant about arrears and quantum thereof.

26. In **Vasant Rao Roman Vs. Union of India & others, 1993 (Suppl.) (2) SCC 324** arrears of salary was denied to employee though it was held that denial of promotion on higher post on account of wrong fixation of seniority was illegal. The Apex court held that principle of "no work, no pay" would have no application to the said case since

employee was neither under suspension nor any disciplinary proceeding was pending against him and on the contrary he was made to suffer on account of administrative reason for which he was not responsible. There was shortage of literate Shunters at Gwalior during 1960 and the employee being literate was deputed for table work and therefore, for administrative reason, he could not complete requisite number of firing kilometers. The juniors were promoted as Shunters and Drivers and his claim was ignored on account of lack of requisite number of firing kilometers. Thus, on the one hand, the employee was utilized by department to benefit itself with qualification of employee since literate Shunters to discharge table work were not readily available and on the other hand, for the same qualification, he was denied promotion on the ground that he has not completed requisite number of firing kilometers. Hence, Apex Court held that there was no justification in denying him arrears of emoluments from the date he was allowed promotion to the post of Shunter Grade 'B' and Driver Grade 'C'.

27. In **Surjit Ghosh Vs. Chairman & Managing Director, United Commercial Bank and Ors. AIR 1995 SC 1053**, as a result of disciplinary proceedings, the employee was punished but the said order of punishment was passed by an authority to whom an appeal otherwise would lie under the rules and thereby the employee was denied right of appeal though conferred under the rules. The Apex Court held such exercise of power by higher authority illegal but while considering question as to what consequential orders should be passed, in the facts of the case, noticed that proceedings against employee were pending since 1982 and almost for 13 years the employee was out of employment. He also at one stage was inclined to forego all the arrears of salary provided he is reinstated in service on the post to which he was entitled with the benefit of continuity in service to which the Bank did not agree. The court thereafter noticed that his allegations that charges were trumpeted against him cannot be said to be without any substance, the inquiry was also

defective, he was an ex-army officer and therefore, instead of remanding the matter, a lump sum compensation would be just and reasonable. The arrears of salary and future salary would have come to about 20 lacs and noticing the fact that the Bank being nationalized, the money belongs to public and such a huge amount should not be allowed to be paid to someone who has not worked for a long time at all just for the reason that Bank feels that it has lost confidence in the employee, the Court directed for payment of a lump sum compensation of Rs. 50,000/- in lieu of arrears of salary and reinstatement in service with continuity of service without any loss of seniority.

28. In **Smt. Sudha Srivastava Vs. Comptroller and auditor General of India, 1996 (1) SCC 63 following K.V. Jankiraman (supra)**, Apex Court allowed arrears of salary to the legal heirs of deceased employee on the ground that he was denied promotion on account of criminal proceedings wherein he was honourably acquitted.

29. In **State of Haryana and Ors. Vs. O.P. Gupta and others, 1996 (7) SCC 533 = AIR 1996 SC 2936** as a result of redetermination of seniority, pursuant to direction of Apex Court, promotions were allowed retrospectively but arrears denied. The Apex Court noted that incumbents, who approached the Court claiming arrears of salary though contended that they were ready but were not allowed to work on higher post on account of wrong determination of seniority but their contention could not withstand judicial scrutiny for the reason that they were not the persons who agitated the issue of seniority earlier. Some other persons disputed seniority list which was ultimately decided by Apex Court directing for redetermination of seniority and therefore, contention of employees that they were ready to work was contrary to record. It was also held where a seniority list has to be redrawn and promotions have to be made and until that exercise is undertaken, it was not open to employees concerned to claim that they were ready to work on higher post and thus question of entitlement of arrears on promotional

post would not arise. The law laid down in **K.V. Jankiraman (Supra)** was distinguished on the ground that it was a case of sealed cover procedure but would have no application to the case of promotion as a result of redetermination of seniority.

30. In **J.N. Srivastava Vs. Union of India and another, 1998 (9) SCC 559**, the employee served a notice of voluntary retirement but before communication of its acceptance withdrew the same. However the employer forced voluntary retirement upon him whereagainst he approached Tribunal, which held that voluntary retirement having been given effect to and employee also having handed over charge, no relief can be granted to him. The Apex Court reversed judgment of Tribunal and held that before communication of acceptance of letter of voluntary retirement, it was open to the employee to withdraw the same. Further observing that employee was denied work though he was ready, it was held that he is also entitled for benefit of salary for the period he was denied work by employer and principle of "no work, no pay" would not apply.

31. A Constitution Bench considered application of "no work, no pay" in the matter of employees of Bank going on strike in **Syndicate Bank Vs. K. Umesh Nayak AIR 1995 SC 319** and observed that whoever voluntarily refrains from doing work when it is offered to him is not entitled for payment for the work not done. In other words that is the dictum of "no work, no pay". However, it was also held where issue pertaining to strike is dealt with by statute or contract between employer and employee recognizing right of employees to go on strike, in such case in order to get entitlement for wages for the period of strike, it has to be both legal and justified.

32. In **State Bank of India Vs. Anjan Sanyal AIR 2001 SC 1748** an employee was transferred but he did not comply the same and made representations for its cancellation. He was relieved in absentia and reminded by the Bank to join at the place of transfer but he did not obey,

whereafter another order was passed transferring him to another place but that too was not obeyed and instead the employee filed a writ petition wherein an interim order was passed directing employee to obey the later order of transfer which was not complied by him again and instead he preferred an intra Court appeal wherein he was allowed some more time to join at the later place of transfer. The employee filed a special leave petition which was dismissed. However, the employee did not join at the place of transfer. The writ petition was ultimately allowed by Hon'ble Single Judge setting aside order of transfer with all consequential benefits and salary for the period he was not in the office. The Apex Court, in the appeal of the Bank, observed that in such a case where an employee, who has not discharged any duty by disobeying order of transfer, if is allowed salary for the period he was absent, it would amount to granting a premium to an errant officer. Accordingly, setting aside judgment of High Court, Apex Court left it open to the Bank to deal with the period of absence in accordance with rules of Bank.

33. In **Food Corporation of India Vs. S.N. Nagarkar AIR 2002 SC 808**, notional promotion without arrears was allowed by employer relying on judgment of Apex Court in **O.P. Gupta (Supra) and Paluru Ramkrishnajah (Supra)**. The Apex Court found that notional promotion was allowed pursuant to order dated 6.5.1994 passed by High Court in Writ Petition No. 4983 of 1993 wherein a direction was also issued for payment of arrears of pay. The said judgment having attained finality it was not open to deny arrears of salary while implementing said judgment and to defend such denial in execution proceedings. Moreover, it was held that entitlement of employee for arrears of pay and allowances is within the domain of court and if it is satisfied that employee was not considered for promotion to the promotional post for no fault of him but on account of fault of authorities concerned, it can always allow arrears of pay and allowances, since it is settled law that in exercise of writ jurisdiction the Court can mould relief having reference to the facts of the

case and interest of justice.

34. In **A.K. Soumini v. State Bank of Travancore and Anr.** 2003(7) SCC 238= AIR 2003 SC 3137, the Court upheld denial of arrears on the ground that as a matter of fact, employee was disentitled for promotion under the promotion policy but taking into account pendency of appeal before the Court for a considerable time on account whereof employee could not appear in subsequent tests, benefit of promotion was allowed, which was more in the nature of gesture of gratis and not by way of any right to which she was entitled. Therefore, notional promotion allowed by the Bank with revision of pay scale was found to be more than what ought to have been allowed to her, be it either in law or equity, and her further claim for payment of arrears was found to be highly far-fetched, without any basis and unjust. This is apparent from para 9 of the judgment, which is reproduced as under:

"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 a minimum eligibility mark of 6 1/2 at the interview and the learned single Judge, allowed the claim only on the ground that such prescription of a minimum mark 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 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 farfetched 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 of our interference."

35. In **Punjab National Bank v. Virender Kumar Goel**, AIR 2004 SC 3988, the employees were denied work despite withdrawal of

their options seeking voluntary retirement. It was held to be illegal on the ground that before acceptance, it is always open to the employee to withdraw such option and therefore, for the period the employees could not work, arrears was allowed. The Apex Court held that principle of "no work, no pay" would not apply in such a case since employees were out of their job for no fault of their. It also held that a party, who is in breach of contract, can hardly seek for any equitable relief. Since the Bank did not permit employees to work and breached contract, it did not lie in its mouth to deny arrears of salary to the employees.

36. In **General Manager, Haryana Roadways Vs. Rudhan Singh**, AIR 2005 SC 3966, the employee was engaged for a short period i.e. 16.3.1988 to 28.2.1989 with some breaks and thereafter was not given any appointment. He raised an industrial dispute regarding validity of his termination wherein, it was held that having completed 240 days of service in a calendar year, his termination was in violation of Section 25F of the Industrial Disputes Act, 1947. Declaring his termination illegal, he was held to be entitled for reinstatement, continuity of service and 50% of back wages. Upholding the award of Industrial Tribunal-cum-Labour Court holding termination of employee as illegal, the Court and noticed that in the matter of award of back wages, there is no rule of thumb that in every case whenever termination is found to be illegal, full or some back wages have to be allowed to the workman. A lot of factors have to be taken into consideration which include how quick the employee was in taking legal action regarding his grievance against action of employer, delay if any in litigation and whether employee or any other person is responsible therefor. Moreover, factors like manner and method of selection and appointment, namely proper advertisement, inviting applications from Employment Exchange; nature of appointment whether ad-hoc, short term, daily wage, temporary or permanent in character; any special qualification required for the job etc. are of relevance to weigh balance of decision regarding wages. Moreover, length of service

rendered by employee, age and qualification showing that he may not be in a position to get any other employment, a regular service of permanent character if terminated illegally would attract different consideration than a short term or interrupted daily wage employment though has completed 240 days in a calendar year. The Court also held that a person appointed on daily wage basis gets wages for the days only he has performed work and when work not done, remuneration is not to be paid and this is also a relevant factor. Whether employee was gainfully employed during the period of unemployment was also held to be a relevant factor.

37. In **Kendriya Vidyalaya Sangathan Vs. S.C.Sharma, 2005 (104) FLR 863 (SC)=2005(2) SCC 363** relied upon by learned Additional Chief Standing Counsel, Apex Court noticed that while setting aside an order of dismissal or termination, full back wages is not natural consequence and when question of back wages is to be determined, employee has to show that he was not gainfully employed and initial burden lay on him. However, since the employer was given a liberty to proceed afresh against employee, Apex Court did not express any final opinion on the entitlement of service benefits to the employee concerned and held that final decision would be taken by competent authority in the departmental proceedings.

38. In **Srikantha S.M. Vs. Bharath Earth Movers Ltd. (2005) 8 SCC 314**, the Court allowed arrears of salary in the case where employee was denied work by not permitting him to withdraw his resignation, which was held to be illegal and following J.N. Srivastava (Supra) and Shambhu Murari Sinha Vs. Project and Development India Ltd., 2002(3) SCC 437, the Court held that the employee is entitled for full salary for the said period and observed as under:

"We must frankly admit that we are unable to uphold the contention of the respondent Company. A similar situation had arisen in J.N. Srivastava and a similar argument was advanced by the employer, the Court, however, negatived the argument observing that when the workman was willing to work but the employer did not allow him to work, it would not be open to the employer to deny monetary benefits to

the workman who was not permitted to discharge his duties. Accordingly, the benefits were granted to him. In Shambhu Murari Sinha II also, this Court held that since the relationship of employer and employee continued till the employee attained the age of superannuation he would be entitled to "full salary and allowances" of the entire period he was kept out of service. In Balram Gupta in spite of specific provision precluding the government servant from withdrawing notice of retirement, this Court granted all consequential benefits to him. The appellant is, therefore, entitled to salary and other benefits."

39. In **Baldev Singh v. Union of India and Ors.**, AIR 2006 SC 531, the employee was convicted in a criminal case whereupon he was dismissed from service w.e.f. 18.7.1990. However, in appeal he was acquitted vide High Court judgment dated 26.3.1992 and was released from jail on 4.4.1992 whereupon he claimed that he reported for duty on 5.4.1992 but the said fact was denied by Union of India and it was pointed out that after acquittal, order for his reinstatement was passed and he was repeatedly required to join his parent unit but he did not respond whereupon High Court held that he was not entitled for salary for the period he was not in service. Upholding the judgment, Apex Court held that employee was not in actual service for the period he was in custody and since he was terminated on the ground of his conviction, acquittal will not automatically give benefit of continuous service and in any case, since he has not rendered any service, is not entitled for arrears of salary.

40. The question of arrears of salary has been dealt with in detail recently in **U.P. State Brassware Corporation Ltd. and Anr. v. Udai Narain Pandey**, AIR 2006 SC 586 and Apex Court has observed that earlier direction to pay full back wages on a declaration that order of termination was invalid used to be usual result but now, with passage of time, a pragmatic view of the matter is being taken by Court realizing that an industry may not be compelled to pay to workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively, as a result whereof, employer would be compelled to go back to a situation which prevailed many years ago when employee was retrenched/terminated. It was held that no precise formula can be laid down as to under what circumstances payment of

entire back wages should be allowed, but held that it depends upon the facts and circumstances of each case. It cannot be automatic and should not be granted mechanically only because on technical ground or otherwise, order of termination has been found defective or illegal. It was also observed that payment of back wages involves a discretionary element in it and has to be dealt in the facts and circumstances of each case and no straight-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety. Noticing the change in the approach of the Courts in dealing with such matters, in paras 44, 45 and 46 of the judgment it was held:

"44. Industrial Courts while adjudicating on disputes between the management and the workmen, therefore, must take such decisions which would be in consonance with the purpose the law seeks to achieve. When justice is the buzzword in the matter of adjudication under the Industrial Disputes Act, it would be wholly improper on the part of the superior courts to make them apply the cold letter of the statutes to act mechanically. Rendition of justice would bring within its purview giving a person what is due to him and not what can be given to him in law.

45. A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the Junctions of an industrial court shall lose much of its significance.

46. The changes brought about by the subsequent decisions of this Court probably having regard to the changes in the policy decisions of the government in the wake of prevailing market economy, globalization, privatization and outsourcing is evident."

41. I may also add one more aspect. Many a times, when employee approaches Court challenging an order of retirement, dismissal or removal etc. in writ jurisdiction and prays for an interim relief, while entertaining writ petition, the Court normally does not grant any interim relief for the reason that it is treated like granting a final relief to the employee at the stage of admission and also against well established principle, applicable for grant of interim injunction that not only a prima facie case must be shown but petitioner has to show balance of convenience and irreparable loss, lying in his favour. In the aforesaid kind of cases, since employee can always be compensated while granting final relief by allowing wages for the period, he is out of employment, interim relief is normally denied. Therefore, it is a relevant factor as to when the employee has approached

the Court. Pendency of writ petition and non grant of interim order in view of the aforesaid legal principle should not normally result in denial of the ultimate relief of salary to the employee, when impugned order is found to be illegal, unless there are certain other factors, a few whereof have already been enumerated hereinabove, justifying denial of full salary or arrears, otherwise it would amount to denial of an effective relief to a litigant for which he is not at fault and also confer premium upon other side for passing an illegal order and, thereby, depriving the employee from discharging any duty. We cannot forget that an employee has no right to work but only a right to get salary and it is always open to the employer to take work from the employee or not but he has to pay salary so long as employment is not terminated in accordance with law or in accordance with terms of his contract.

42. In **Public Service Tribunal Bar Association v. State of U.P. and Anr. AIR 2003 SC 1115**, the Court while justifying non grant of interim orders in the case of suspension, dismissal, removal etc. has observed that in such cases the employee can be suitably compensated when the said order is not found in order but in case the interim order is granted, it would amount to allowing wrong usurpation of the office by the employee during operation of interim order and this act may be irreversible. The Court observed as under:

"Dismissal, removal, termination and compulsory retirement puts an end to the relationship of employer and employee. In case of suspension, reduction in rank or reversion the relationship of employer and employee continues. Interference at the interim stage with an order of dismissal, removal, termination and compulsory retirement would be giving the final relief to an employee at an interim stage which he would have got in case the order of dismissal, removal, termination and compulsory retirement is found not to be justified. If the order of dismissal, removal, termination and compulsory retirement is set aside then an employee can be compensated by moulding the relief appropriately in terms of arrears of salary, promotions which may have become due or otherwise compensating him in some other way. But in case the order of dismissal, removal, termination and compulsory retirement is found to be justified then holding of the office during the operation of the interim order would amount to usurpation of an office which employee was not entitled to hold. The action becomes

irreversible as the salary paid to the employee cannot be taken away as he has worked during that period and the orders passed by him during the period he holds office (because of the interim order) cannot also be put at naught." (Para 40)

"Orders of suspension, dismissal, removal, reduction in rank, termination, compulsory retirement or reversion of a public servant normally should not be interfered with at an interim stage as the employee can be suitably compensated in case the order of suspension, dismissal, removal, etc. is found not to be in order. The cases in which the operation of orders of dismissal, removal, termination etc. is stayed by way of interim order is later on upheld at the final stage then it results in wrong usurpation of the office by the employee during the operation of the interim order. This act becomes irreversible and the employer cannot be suitably compensated by moulding the relief at the final stage." (Para-42)

43. In **Ram Swarup Srivastava Vs. Allahabad District Cooperative Bank Allahabad & Ors.**, 2005 (2) ESC 1215 a Division Bench of this Court while considering entitlement of arrears of salary to an employee, who was wrongfully retired before attaining age of superannuation, held that he is entitled to salary of the said period for which he was not allowed to work and was wrongly retired. It was noticed that employee approached the Court before his retirement immediately after premature retirement, forced upon him by the employer but since no interim order was granted, he could not render any service and therefore, he is entitled to salary of the said period.

44. Thus in the matter of retirement wrongfully forced upon an employee consistently, the view has been to allow arrears of salary for the period the employee could not render any duty due to wrongful retirement and this has been followed recently in **Harwindra Kumar Vs. Chief Engineer, Karmik and others**, 2006 (1) UPLBEC 20 (SC) where the Court observed as under:

"It is directed that in case the employees have been allowed to continue up to the age of 60 years by virtue of some interim order, no recovery shall be made from them but in case, however, they have not been allowed to continue after completing the age of 58 years by virtue of erroneous decision taken by the Nigam for no fault of theirs, they would be entitled to payment of salary for the remaining period up to the age of 60 years which must be paid to them within a period of three months from the date of receipt of copy of this order by the Nigam."

45. It is important to notice at this stage that conduct of the employee in

order to show his readiness by taking such steps, as permissible in law, to compel employer to permit him to work is of utmost importance and this includes whether employee took steps for preventing employer from retiring him premature wrongfully well in time. Where an employee has failed to approach the Court well in time, such relief has been denied on the ground of delay, laches and acquiescence. In **Chairman, U.P. Jal Nigam and Anr. v. Jaswant Singh and Anr.**, 2007 (1) ESC 40 (SC) following judgment of Apex Court in **Harwindra Kumar (supra)**, a number of employees of U.P. Jal Nigam, who were retired at the age of 58 years, approached the High Court, claiming that they are also entitled to continue till 60 years of age and High Court allowed the writ petition with benefit of arrears of salary etc. The judgment of Hon'ble Single Judge was confirmed in special appeal whereagainst U.P. Jal Nigam approached Apex Court and reversing judgment of High Court, it was held that employees accepted retirement and did not challenge the same in time and thus guilty of acquiescence. If they would have been vigilant enough, could have filed writ petition, as others did, immediately when they were sought to be retired at the age of 58 years, but they chose to abstain and did not rise to the occasion. The Court, therefore, should be very slow in granting relief to such litigants. It was also noticed that if the said employees would have challenged the retirement being violative of provisions of Act well in time, the employer could have taken appropriate steps to raise funds to meet liability in case he loses the matter in the Court or could have taken such other remedial measures, as necessary, but since employees did not come to the Court in time, the Court should not come to rescue such persons, who are guilty of waiver and acquiescence. Therefore, delay and laches is also a relevant factor in granting relief in such matters including arrears of salary.

46. In **Sharda Singh Vs. State of U.P. and Ors.**, JT 2009 (5) SC 487, referring to an earlier decision in **State of West Bengal Vs. Bata Krishna Burman**, AIR 1970 SC 156, the Court observed:

"..a Government servant exonerated of the charges framed against him cannot be deprived of any portion of his pay for the period of suspension. Then again there could be a rule or regulation which may provide, that, during the period of suspension, an employee would be entitled only for suspension allowance, dehors the ultimate result of the enquiry proceedings."

47. In **Gujarat Agricultural University Vs. All Gujarat Kamdar Karmachari Union**, 2009 (15) SCC 335, doctrine of "no work, no pay" has been discussed in a bit detail. The Court said

"One of the principles well known in the matters of service is that if a person has worked, he must be paid and if he has not worked, he should not be paid. This is expressed in doctrine, 'no work, no pay'. Another oft-repeated principle in service jurisprudence is that if an employer has wrongly denied an employee his due then in that case he should be given full monetary benefits."

48. The Court then said that none of these principles is absolute nor can these principles be applied as a rule of thumb.

49. In **Shiv Nandan Mahto Vs. State of Bihar & Ors.** 2011(11)SCC 626, the Court, set aside decision of High Court denying of salary, on account of suspension, by observing :
 "The conclusion is, therefore, obvious that the Appellant could not have been denied the benefit of backwages on the ground that he had not worked for the period when he was illegally kept out of service. In our opinion, the Appellant was entitled to be paid full backwages for the period he was kept out of service."

50. In respect of principle of grant of backwages, in **Chairman-Cum-M.D., Coal India Ltd. and Ors. Vs. Ananta Saha and Ors.**, JT 2011 (4) SC 252 the Court said:

"....even after punishment imposed upon the employee is quashed by the court or tribunal, the payment of back wages still remains discretionary. Power to grant back wages is to be exercised by the court/tribunal keeping in view the facts in their entirety as no straitjacket formula can be evolved, nor a rule of universal application can be laid for such cases. Even if the delinquent is re-instated, it would not automatically make him entitled for back wages as entitlement to get back wages is independent of re-instatement. The factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate authority/court or tribunal. In such matters, the approach of the court or the tribunal should not be rigid or mechanical but flexible and realistic."

51. In making the above observation, the Court relied on its earlier decision in U.P.S.R.T.C. Vs. Mitthu Singh AIR 2006 SCC 3018; Secretary, Akola Taluka Education Society and Anr. Vs. Shivaji and Ors., (2007) 9 SCC 564; and Managing Director, Balasaheb Desai Sahakari S.K. Limited Vs. Kashinath Ganapati Kambale (2009) 2 SCC 288).

52. Upon consideration of material on record, we find that applicant respondent was not promoted on the post of Carriage Fitter Grade-III in the year 1987 when junior to him was promoted not on account of any fault attributable to applicant-responder but to petitioners. That being so, submissions made by learned Senior Counsel amounts to give advantage to petitioners themselves for their own wrong. Once it is an undisputed fact that juniors to applicant-responder have been granted promotion and there was no hindrance in the grant of promotion to applicant-responder, then applicant-responder is clearly entitled to proforma promotion along with proforma arrears of salary. Denial of such benefit to applicant-responder will cost permanent loss to applicant-responder which cannot be justified in any manner. Findings recorded by Tribunal are neither perverse, illegal or erroneous. Consequently, conclusion drawn by Tribunal is not liable to be interfered with.

53. In view of discussions made herein above, writ petition is dismissed with cost of Rs. 25,000/-.

Order Date :- 17.12.2019/Arshad