

(1996) 12 P&H CK 0031
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 11749 of 1996

Krishan Kumar

APPELLANT

Vs

Haryana State Federation of Consumers Co-op. Wholesale
Stores Ltd. (CONFED) and Another

RESPONDENT

Date of Decision : 10-12-1996

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (1998) 3 LLJ 667 : (1998) 118 PLR 831

Hon'ble Judges : R.S. Mongia, J; N.C. Khichi, J

Bench : Division Bench

Advocate : S.K. Mittal, for the Appellant; Hemant Kumar, for the Respondent

Judgement

R.S. Mongia, J.

1. Whether an employee who is reinstated in service with all consequential benefits and thereafter promoted with retrospective effect is entitled to salary/wages w.e.f. the date of retrospective promotion? This is the question that calls for consideration in this writ petition.

2. Briefly, the facts of the case leading to the filing of the present writ petition are :--

3. The petitioner was appointed as a Salesman with Haryana State Federation of Consumer's Cooperative Wholesale Stores Ltd. (in short "the CONFED") on December 25, 1970. His services were terminated on May 8, 1975. He raised an Industrial dispute and while the matter was pending before the Labour Court, he was reinstated by the CONFED in service on July 30, 1982. He joined duties after re-instatement on August 2, 1982. The Labour Court gave its award on September 12, 1985, copy Annexure P-1. The reference was answered in favour of the petitioner and he was ordered to be reinstated in service with back wages from the date of dismissal to the date of his reinstatement, i.e. August 2, 1982, with all benefits of previous service. This award became final between the parties

as it was not challenged by the Management any further. During the period the petitioner remained as a dismissed employee, promotions were made of his juniors to the post of Store Keeper. Despite representations, the petitioner was not considered for promotion w.e.f. the dates his juniors were promoted. He filed Civil Writ Petition No. 3659 of 1994. That writ petition was disposed of on December 1, 1994, with a direction to the respondent to dispose of the representation of the petitioner within a period of two months. It was further observed that if the petitioner is found entitled to grant of promotion, he would be given promotion from the date his juniors were promoted. On May 11, 1995, the respondent rejected the representation of the petitioner. The petitioner again filed C.W.P No. 7604 of 1995 challenging the order dated May 11, 1995, the respondent rejected the representation of the petitioner. The petitioner again filed C.W.P. No. 7604 of 1995 challenging the order dated May 11, 1995, by which the respondent had declined to promote the petitioner. On notice of motion having been issued, the counsel for the respondents made a statement on April 18, 1996, to the effect that the impugned order of rejection of promotion of the petitioner had been withdrawn and a fresh order granting promotion to the petitioner had been passed. On this, the writ petition was disposed of as infructuous. It is averred in this writ petition that when the respondents' counsel made statement that fresh order of promotion had been passed, the same was not produced in the Court. It has further been averred that the petitioner received the order of promotion dated April 17, 1996, on April 25, 1996. Copy of this order has been appended as Annexure P-3 with this writ petition. By this order, the petitioner was promoted as a Store Keeper w.e.f. February 11, 1980. when his junior Shri Ved Parkash was promoted as such. It was mentioned in the order that "he will be given all consequential benefits from February 11, 1980, to his date of joining as Store Keeper except arrears for this period as he has not actually performed the duties of Store Keeper during this period on the principle "of no work, no pay" ". It is this part of the order that has been made subject matter of challenge in this writ petition.

4. According to the learned counsel for the petitioner, if an employee is reinstated in service with all consequential benefits and he is promoted with retrospective effect when his junior was promoted, the salary/wages w.e.f. the deemed date of promotion cannot be withheld. This, according to the counsel, is because of the fact that when a Court after holding the order of termination to be illegal further gives direction that the employee is to be reinstated with all consequential benefits, it ipso facto follows that the person has to be considered for promotion with retrospective effect w.e.f. the dates his juniors were promoted to the higher rank and if found suitable, he is to be paid salary/wages of that period as the employee never refused to work on the promoted rank but it was because of the action of the employer that he was kept out of the job by passing order of termination which has been held to be illegal by a competent authority. In support of his contention, learned counsel for the petitioner relied upon Supreme Court judgment in Union of India Vs. K.V. Jankiraman, etc. etc., and

various Division Bench and Single Bench judgments of this Court reported as *Vidya Parkash Harnal v. State of Haryana* 1996 (3) S.C.T. 785, (Division Bench), *Mewa Ram v. State of Haryana* 1995 (3) R.S.J. 875 (Division Bench), *Mrs. Asha Rani Lamba, Headmistress v. State of Haryana and Anr.* 1983(1) S.L.R. 400, and *Shri Chanan Dass Chadha v. The State of Punjab and Anr.* 1980(3) S.L.R. 702. On the other hand, learned counsel for the respondents relied upon the authority reported as *State of Haryana and Ors. v. O.P. Gupta etc.*, *Judgments Today* 1996(3) SC 141, to contend that in case of retrospective promotion, the employee having not actually worked on the post is not entitled to the salary/wages for the period on the principle of "no work, no pay".

5. After hearing learned counsel for the parties, we are of the view that there is merit in the submissions of the learned counsel for the petitioner. If an employee is kept out of the job by passing an order of termination and that termination order is held to be illegal and the Court orders his reinstatement with all consequential benefits, the end result is that the employee is deemed to have worked during the period he has been per force kept out of service by the passing of an illegal order of termination. He is deprived actually of the work by the illegal action of the employer. The employee had never refused to do the work. Such an employee is also entitled to be considered for retrospective promotion when his juniors were promoted to the higher rank during the period he was kept out of service by an illegal order of termination. If he is found to be suitable and eligible for promotion with retrospective effect, the necessary corollary is that he is deemed to have worked for all purposes on the higher post and is entitled to the payment of wages. The deeming fiction has to be taken to its logical end. Lord Asquith in *East Buntine & Co. Ltd. v. Finsbury Borough Council* 1932 A.C. 109, had observed at page 132 as under:

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

In *K.V. Jankiraman's* case (supra) it was observed by the Apex Court that when an employee is completely exonerated in criminal/ disciplinary proceedings and is not visited with the penalty even of censure indicating thereby that he was not blame-worthy in the least, he should not be deprived of any benefits including the salary of the promotional post. The normal rule of "no work no pay" is not applicable to such cases where the employee, although he is willing to work, is kept away from work by the authorities for no fault of his. If the employee remains away from the work for his own reasons, although the work is offered to him, then he may not be entitled to the salary.

6. After considering the ratio in *K.V. Jankiraman's* case (supra), the Division

Bench of this Court in Vidya Parkash Harnal's case (supra) observed in para 7 of the report as under:

"7. Similarly, the argument that the petitioner was not entitled to the grant of emoluments on the principle of "No work, no pay" is apparently misconceived and based upon wrong notions of law. If a civil servant is not offered the work to which he was legally entitled, he cannot be deprived of the wages for the post to which he subsequently is held entitled to. Permitting such a course to be adopted would be encouraging the imposition of double penalty, that is, firstly by declining the civil servant his right of promotion and secondly by depriving him of the emoluments to which he would have been entitled to upon promotion which subsequently is considered in his favour. Deprivation to work against the post to which a civil servant is entitled on promotion is always at the risk and responsibility of the State and cannot be made a basis for depriving such a civil servant of the emoluments to which he was entitled, had he been promoted in accordance with the rules at the time when he became eligible for such promotion. The Courts cannot ignore the magnitude of the sufferings and the pains to which a civil servant is subjected on account of deprivation of the monetary benefits particularly in this case of skyrocketing prices and non-availability of essential requirements of livelihood. The Court cannot shut its eyes and forget the holocaust of economic deprivation to the petitioner and his dependents. Such a deprivation might have upset the career of the dependents, depriving the society of the services of such youth and budding dependents or children of the petitioner. The executive once being satisfied that a civil servant was entitled to the promotion with retrospective effect cannot deprive him of the benefits of salary accruing on account of such promotion from an early date without assigning valid, cogent and specific reasons. The order impugned in this case by which the petitioner/appellant was deprived of his right to claim back wages is admittedly non-speaking without assigning any justification or cogent and specific reasons."

Similar is the view expressed by the other Division Bench (Supra)."

7. So far as O.P. Gupta's case (supra) of the Apex Court cited by the respondents' counsel is concerned, that is clearly distinguishable and has no application to the facts of the present case. In that case, it was held that the parties before the Court were entitled to promotion on the basis of seniority, which is drawn in accordance with the rules. Before the seniority list according to the rules was drawn, the question of entitlement to work in the promotional post did not arise and consequently, the payment of arrears of salary also did not arise. In the said case, the Supreme Court had earlier directed the State Government to frame seniority in accordance with the rules and on that basis the promotions were made with retrospective effect. The Court itself observed in para 6 of the report as under :-

"Having regard to the above contentions the question arises: whether the respondents are entitled to the arrears of salary ? It is seen that their

entitlement to work arises only when they are promoted in accordance with the Rules. Preparation of the seniority list under Rule 9 is a condition precedent for consideration and then to pass an order of promotion and posting to follow. Until that exercise is done, the respondents cannot be posted in the promotional posts. Therefore, their contention that though they were willing to work, they were not given the work after posting them in promotional posts has no legal foundation. The rival parties had agitated their right to seniority. Ultimately, this Court had directed the appellant to prepare the seniority list strictly in accordance with Rule 9 untrammelled by any other inconsistent observation of the Court or the instructions issued in contravention thereof. Since the order had become final in 1990, when the appeal had been disposed of by the Court by the above directions, the State in compliance thereof prepared the seniority list in accordance with the Rules and those directions and promotions were given to all eligible persons and postings were made accordingly on December 1, 1992. In the interregnum some had retired. As stated earlier, though the deemed date has been given as January 1, 1983, the respondents cannot legitimately claim to have worked in those posts for claiming arrears and, as a fact, they did not work even on ad hoc basis."

The Supreme Court further observed that on the facts of the case, the ratio in Jankiraman's case (supra) had no application to the facts of the case.

8. After considering the ratio of the judgment in Jankiraman's case (supra) as also in the Division Bench judgment cited above as also in O.P. Gupta's case (supra), we are of the view that the case of the petitioner is fully covered by the dictum of the Supreme Court in Janakiraman's case (supra) as also the ratio of the judgment of the different Division Benches cited above. The respondents were not justified in not granting the salary/wages on the promoted rank for the period the petitioner remained out of service because of the illegal order of termination that was passed.

9. To be fair to the learned counsel for the respondents it may be observed that it was argued by him that when the petitioner was reinstated in service by the respondent-management during the pendency of the proceedings before Labour Court, it was specifically ordered on July 30, 1982, that the petitioner was being reinstated with immediate effect subject to the condition that he would not claim any salary and allowances or any other benefit with respect to the period between the date of his relieving from April 3, 1975, and rejoining service after the issue of the order dated July 30, 1982, In view of this order, the petitioner is not entitled to claim any salary or any other benefits on account of the grant of retrospective promotion. Suffice it to observe here that the respondent-management had taken this specific plea before the Labour Court and it was repelled by the Labour Court as under:

"Another point raised on behalf of the management Was that since the workmen accepted reinstatement without any protest regarding back wages, he cannot be allowed to agitate the question of back wages at this stage. This contention was

ably met by Shri S.S. Gupta by citing 1977 (1) LLN 532 between Harbhajan Singh and Ors. and Assistant Labour Commissioner (Central), Chandigarh and Ors. Simply because the workman did not press his claim for back wages at the time when he was reinstated by the respondent vide its order dated July 30, 1982 (he actually resumed duties on August 2, 1982), the workman cannot be deprived of benefits of back wages from the date of dismissal to the date of reinstatement i.e. August 2, 1982 with all benefits of previous service. The reference is answered and returned accordingly. There is no order as to costs."

This award as observed above has become final between the parties. So we do not find any merit in the submission of the learned counsel for the respondents that in view of the order of reinstatement dated July 30, 1982, passed by the management itself, the petitioner is not entitled to claim salary on the promoted rank w.e.f. date of his promotion.

10. For the foregoing reasons we allow this writ petition and quash the order dated April 17, 1996, copy Annexure P-3, to the extent it deprives the petitioner the wages/salary of the post of Store Keeper w.e.f. February 11, 1980. Let the difference of pay/arrears be released to the petitioner within a period of three months of the receipt of copy of this order from this Court or a certified copy thereof from the petitioner.