

**(2014) 04 J&K CK 0045**

**In the Jammu And Kashmir High Court**

**Case No : L.P.A.S.W. No. 52 Of 2002 and C.M.A. No. 70 Of 2002**

Union of India and Others

APPELLANT

Vs

Jagdev Singh Langhe

RESPONDENT

**Date of Decision : 22-04-2014**

**Acts Referred:**

**Citation : (2014) 04 J&K CK 0045**

**Hon'ble Judges : M.M. Kumar, C.J;Muzaffar Hussain Attar, J**

**Bench : Division Bench**

**Advocate : Neeru Goswami, Sr. Panel Counsel, Advocates for the Appellant; K.S. Johal, Sr. Advocate and Shahla Rafiqi, Advocates for the Respondent**

## **Judgement**

M.M. Kumar, C.J.—A short question of law raised in the instant appeal preferred by Union of India and its officer is ""whether an order of

retrospective promotion would bring monetary benefits from the date of retrospective promotion or notional benefits as have been given by the

appellants to the petitioner-respondent"". The aforesaid question emerges from the facts which are set out below.

2. The petitioner-respondent (Jagdev Singh Langeh) joined armed forces as a Record Clerk on 27.01.1973. He was promoted on the post of

Lance Naik in 1979 and became Naik Clerk in the same year. He earned quick promotion in July, 1980 and became Head Clerk.

2.1. The petitioner-respondent then applied for the post of Quarter Master/Record Officer which is an officer rank post. He would have got

benefits of conferment of permanent commission after being appointed on the post of Quarter Master/Record Officer. However, his claim was

rejected for appointment to the post of Quarter Master/Record Officer despite the fact that at one stage he was called upon to appear before the

Medical Board and his name was included for appointment as Quarter Master and for grant of commission.

2.2. The petitioner claims that he reported for duty at Officers? Training Academy, Madras on 18.03.1990. He was, however, orally directed not

to attend the training despite the fact that he was attached to the Officers? Training Academy, Madras. Accordingly, he made a statutory

complaint. He then filed a writ petition in the High Court of Bombay (Aurangabad Bench). The Division Bench allowed the petition primarily on the

ground that the order impugned in the petition passed on the complaint made by the petitioner-respondent was reasoned order. Accordingly, the

order was set aside vide judgment dated 04.03.1993 and directions were issued which are discernible from the concluding paras of the judgment

and order. The same are set out below in extenso:--

The earlier writ petition was allowed to be withdrawn, as the statutory complaint was pending. Now, statutory complaint is already disposed of.

The detailed affidavit is filed alongwith the copies of the entire concerned record. The detailed arguments were advanced before us. In view of this,

we do not feel it necessary to direct the petitioner to avail of the alternative remedy, if any available to him, as the documents and facts are urged

before us in detail and we have gone through al the relevant record produced before us.

In view of this, we set aside the order passed on statutory complaint (Exh R-6) and direct the Respondent to admit the petitioner to Officers?

Training Academy for Orientation Course meant for permanent Commission (Specialist) for Quarter Master in pursuance to his earlier selection.

The earlier training course might have already been over. We are also told that presently, there is no training course available. The petitioner should

be given admission to the training course, which may be commenced hereafter, as against 1989 quota.

2.3. As per the directions issued by the Bombay High Court, petitioner-respondent was admitted to the Officers? Training Academy for

undergoing the training course. He was granted permanent commission and was given the rank of 2nd Lieutenant. The petitioner then filed another

petition relatable to the instant appeal. He made the grievance before the Writ Court that despite the order notified in the official gazette dated

15.07.1995 he has not been granted all the benefits. He claimed all the financial benefits with retrospective effect. He, However, conceded that his seniority has been fixed with retrospective effect but no benefit of payment of arrears and allowance with retrospective effect have been given. He placed reliance on the order dated 30.12.1996 and the same reads as under:--  
Order.

The Central government after considering the Statutory complaint dated 15.12.1995 submitted by SI-4130A Lieutenant Jagdev Singh Langeh GS against non fixation of his ante date seniority hereby order that the seniority of the officer be fixed alongwith the officers of 1989 quota of vacancies of PC(SL) without any retrospective benefits of pay and allowances and without any compensations.

2.4. The appellants pleaded before the Writ Court that in accordance with Rule 1 of General Rules, the petitioner was not entitled to pay and allowances before he is actually conferred the commission. The appellants further submitted that undoubtedly seniority of the petitioner was fixed retrospectively along with benefit of notional pay in terms of Rule 1 but he was not entitled to arrears of pay and other allowances. Another argument raised by the appellants was that neither any such relief was claimed before the High Court of Bombay nor it could have been granted, therefore, matter cannot be re-agitated by filing another petition. The Writ Court held that Rule 1 was not applicable and proceeded to observe as under:--

No doubt this Rule speaks of grant of pay and allowances and lays down that a Commissioned Officer shall not be entitled to pay on first appointment for a period in excess of 30 days before the date on which he reports for duty but the question arises as to whether this Rule is applicable to the petitioner. The said rule speaks of those officers who had completed their training in the NDA or in the Military College. This rule would not apply to the case of the petitioner. The petitioner had his training at the Officer's Training Academy, Madras. Strictly speaking this Academy is not covered by the Rule regarding which reference is made and which rule has been noticed above. This is one aspect of the matter.

2.5. The Writ Court also took notice of the facts which were dealt with by the Bombay High Court and proceeded to record another reason for

non-application of Rule 1 by holding as under:--

The other aspect of the matter is that the petitioner was selected for the training in question. He was not permitted to join the training. The

petitioner was forced to approach the High Court of Bombay. On Account of the directions given by the Bombay High Court, the petitioner was

permitted to attend the training. This happened on 19.03.1990. For the reasons indicated in para 3 of the objections he was withdrawn from the

training. As already indicated above, it is because of the directions given by the Bombay High Court, the petitioner completed the course of study.

Thereafter not only the petitioner was allowed to join the course but he was granted Commission also. When this was not allowed w.e.f. the date

from which date the petitioner wanted the benefit, he preferred a statutory appeal. It is for consequential benefits he has approached this Court.

Therefore, to say that the petitioner's case covered by Rule 1 would not be correct. The Rule is applicable to NDA and Military College.

2.6. The Writ Court also overruled two preliminary objections which were in the nature of res judicata and lack of territorial jurisdiction. In respect

of res judicata, the Writ Court observed that the judgment delivered by the Division Bench of Bombay High Court would not cover the situation

which had arisen then. The petitioner-respondent could never contemplate that the relief which has been granted to him would not be accepted in

full measures and he would be deprived of the monetary benefits. In respect of territorial jurisdiction, the Writ Court held that the order dated

30.12.1996 was passed; even notification dated 27.09.1997 was issued at the time when the petitioner was posted and serving in the State of

Jammu and Kashmir. The Writ Court then proceeded to hold that the notification dated 27.09.1997 would indicate that the petitioner-respondent

was given all other benefits as has been given to his other colleagues in the course from the year 1989. The Writ Court also held that denial of

these benefits to the petitioner-respondent would be discriminatory which flows to him as consequential benefits and observed as under:--

So far as the merits of the controversy is concerned this has already been commented upon earlier. A perusal of the notification dated 27.9.1997

would indicate that the petitioner is being given all other benefits as had been given to his other course mates. They were allowed this benefit in the

year 1989. The denial of these benefits therefore, cannot be sustained. The petitioner is held entitled to all consequential benefits as has been given

to his course mates. Because of wrong decision taken by the respondents the petitioner was deprived of his benefits from an earlier date. This is

not sustainable. This is more so when the petitioner has been granted all other benefits.

This petition is allowed.

The petitioner is held entitled to all consequential benefits. Let this be released in favour of the petitioner within a period of three months from the

date copy of the order passed by this court is made available by the petitioner to the respondent authorities and also to the counsel who has put in

appearance on behalf of the respondents.

3. We have heard learned counsel for the parties at a considerable length and have perused the record with their able assistance.

4. It has come on record that the petitioner-respondent was granted permanent commission in the special list in the rank of 2nd Lieutenant as is

evident from gazette notification issued by Government of India on 15.07.1995. The aforesaid orders necessarily preceded by the training

imparted to the petitioner-respondent, which is clear from the record. The directions issued by the Bombay High Court did not grant any monetary

benefit to the petitioner-respondent. All that has been directed is that the petitioner-respondent was to be given admission to the training course,

which was to follow after 1993. The training was to be imparted in respect of a post of 1989 quota. It is obvious that the petitioner-respondent

never worked on the promoted post of 2nd Lieutenant from 1989 but his seniority has been fixed along with his batch mates as is evident from

order dated 30.12.1996. Thus the question of law posed in the first para of this judgment needs to be answered.

5. In the case of State of Haryana and Others Vs. O.P. Gupta, etc., , it has been categorically held by Hon'ble the Supreme Court that the

question of payment of arrears of salary with retrospective effect from the notional dates would not arise because the employee had never worked

during that period on the promotional post. Therefore, the Rule of "no work, no pay" is attracted to such like cases. The aforesaid issue was again

considered by their Lordships of Hon'ble the Supreme Court in the case of State

of Haryana and Another v. S.K. Khosla and others, (2007)15

SCC 777. Placing reliance on the observations made in the case of O.P. Gupta (supra) the same principle has been reiterated holding as under:--

2. Heard the learned counsel for the appellants. He brought to our notice a decision of this Court in State of Haryana v. O.P. Gupta whereunder

in respect of an identical matter arising out of similar proceedings of even date this Court while setting aside the decision of the High Court allowed

the appeal at the instance of the State and held that in the circumstances noticed in that case which are identical as well in the cases before us, the

question of payment of arrears of salary with retrospective effect from the notional dates does not arise since, indisputably the respondents had

never worked during that period in the promotional post, the settled principle in such cases being, "no work, no pay". The said principle applies

with equal force to the cases before us too. Applying the ratio of the said decision these appeals are also allowed and the orders of the High Court

are set aside and the writ petitions before the High Court shall stand dismissed. No costs.

It has also been held that there is neither equity nor justice in favour of an employee in such cases to award emoluments of the higher post when

direction is given for retrospective effect. In that regard reliance may be placed on the observations made in para 13 of the judgment rendered by

Hon'ble Supreme Court in the case of Virender Kumar, General Manager, Northern Railways, New Delhi Vs. Avinash Chandra Chadha and

others, . Similar view has been taken in the cases of P.S. Mahal and Others Vs. Union of India (UOI) and Others, and Paluru Ramkrishnaiah and

Others Vs. Union of India (UOI) and Another, .

6. It is obvious that on principle and precedents the petitioner-respondent cannot succeed on merit. There is still another insurmountable hurdle in

the way of the petitioner-respondent. The petitioner had knocked the door of Bombay High Court and the judgment and order dated 04.03.1993

has attained finality. The relief of arrears from 1989 w.e.f. the date it has been given to the batch mates of the petitioner-respondent ought to have

been claimed before the Bombay High Court because such a relief was available to him. It is well settled that a relief which is available to a litigant,

if not agitated or claimed is deemed to have been claimed and decided against

such a litigant. These principles are well known to law and operate in the nature of constructive res judicata. In that regard reliance may be placed on the provisions of Explanation (IV) to Section 11 of CPC and Order II Rule 2 CPC. The judgments of Hon'ble the Supreme Court have clarified the aforesaid position which is evident from the following observations made by their Lordships in the case of Union Territory, Chandigarh v. Brijmohan Kaur, (2007) 11 SCC 488:--

8. It is astonishing to note that the Tribunal having disposed of the miscellaneous applications on 11-1-2001 observing that notional benefits of increments have been granted to the respondent w.e.f. 19-9-1990 and on regular basis w.e.f. 1-1-2001 the Tribunal has again directed on the subsequent OA that the respondent is entitled to arrears of pay and allowances for the period from 19-9-1990 to 27-2-1996 and directed the appellant to pay the arrears within four months. The aforesaid order of the Tribunal was assailed before the High Court by filing CWP No. 18440 of 2003. The High Court, by its cryptic and unreasoned impugned order, dismissed the writ petition filed by the appellant and affirmed the order of the Tribunal in OA No. 1030/CH of 2002.

9. The direction of the Tribunal which is affirmed by the High Court, in our view, is against the all canons of law directed by this Court. It is settled law that when an incumbent does not discharge any duty, the principle of "no work no pay" would be applicable. This consistent view has been taken by this Court keeping in view the public interest that any government servant who does not discharge his duty should not be allowed to draw pay and allowances at the cost of public exchequer.

10. In the aforesaid facts and circumstances, we set aside the impugned order of the High Court dated 12-7-2005 passed in CWP No. 18440-CAT of 2003 and the order of the Tribunal dated 13-8-2003 recorded in OA No. 1030/CH of 2002.

(Emphasis added)

7. The aforesaid observations show that principle of res judicata is clearly applicable to Writ Court. It is policy of law to discourage vexatious litigation. The parties cannot be vexed twice for the same cause of action, which could have been made a part of earlier litigation between the parties. If the parties are permitted to do so then it is patently against the policy

of law as has been repeatedly reminded by their Lordships of Hon'ble the Supreme Court. In that regard reliance may be placed on the observations made by Hon'ble the Supreme Court in the cases of The Amalgamated Coalfields Ltd. and Another Vs. The Janapada Sabha, Chhindwara, and Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others, . It was held that if doctrine of constructive res judicata was not applied to the writ proceedings it would be open to a party to take one proceeding after another and urged new grounds every time, which was plainly inconsistent with the public policy. The view has been followed in the case of State of U.P. Vs. Nawab Hussain, . The aforesaid principles are well entrenched in the writ jurisprudence of our Constitution and do not call for any deviation in the present case. Therefore, we are of the considered opinion that the learned Writ Court has not examined the issue in its proper perspective and has wrongly granted relief to the petitioner-respondent.

8. Having held in the aforesaid manner, we are constrained to observe that reasoning adopted by the Writ Court does not commend itself to us. It is incorrectly held that issue before the Bombay High Court was different than the one raised before this Court in the writ proceedings relatable to this appeal. The petitioner-respondent filed the writ petition in the year 1992 and the relief of admission to the training course against 1989 quota was given to him. At that stage the other relief of payment of arrears of salary at par with his batch mates could have been easily claimed. Such a plea being available would be deemed to have been availed and decided against the petitioner-respondent as per the principles of constructive res judicata. Therefore, the reasoning adopted by the learned Writ Court has failed to impress us.

9. The other factors which appear to have weighed with the Writ Court are equally bereft of substance. According to the Writ Court, the petitioner-respondent was denied the benefits which have been granted to his batch mates. The principles of law concerning equality presupposes, that two persons must be at the same pedestal to claim the same benefits and the same treatment. The challenging task confronting the Courts is to ensure that the relief on the basis of hostile discrimination is given only when two persons are equal and no relief would be available when two

unequals are identified. However more often than not the unequals are treated equals. This phenomena of committing such type of errors has been

explained by an esteem expert on Constitutional Law of India Sh. H.M. Seervai in Chapter IX of his third edition, wherein new doctrine emerging

from E.P. Royappa Vs. State of Tamil Nadu and Another, has been explained because new theory involves the fallacy of undistributed middle.

The middle term mammal in dogs and cats is not distributed in either premise which results in misapplication. Therefore, the fallacy which has crept

in the reasoning adopted by the Writ Court is that all persons have been given monetary benefits and therefore, the petitioner-respondent should

also be given the same benefits. However, as Sh. Seervai puts it the middle term persons have not been distributed. Therefore, it has become

incumbent to site the doctrine of equality to find out whether petitioner-respondent stood on the same pedestal as his batch mates. The answer

obviously is 'No' because the petitioner-respondent undergoes training much later and therefore, was given commission subsequently (although

retrospectively) then his batch mates. He does not discharge his duties like his batch mates during the retrospective period. These features clearly

distinguished the petitioner-respondent from his batch mates and therefore, he cannot be considered equal to his batch mates for the purpose of

granting financial benefits. The appellants have thus rightly given him notional benefits and principle of "no work no pay" as per the law already

cited in preceding paras has been correctly applied to the facts of the present case. Therefore, the reasoning adopted by the learned Writ Court

even on that count does not commend itself to us and we respectfully disagree with the same.

10. As a sequel to the above discussion, this appeal succeeds. The impugned judgment of the learned Writ Court dated 10.11.2000 is hereby set

aside. The order of the authority dated 30.12.1996 is upheld. The writ petition filed by the petitioner-respondent is held to be non-maintainable as

hit by the principle of constructive res judicata and the same is dismissed. However, keeping in view the peculiar facts and circumstances of the

case, we leave the parties to bear their own costs.