

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 68 of 2004

Thursday..., this the 12th day of October, 2006

CORAM:

**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE MR. K B S RAJAN, JUDICIAL MEMBER**

K. Vasudevan Pillai,
S/o. K. Kesavan Pillai,
Ottattu House, Pirayar,
Kidangoor P.O.,
Kottayam District : 686 572 ... Applicant.

(By Advocate Mr. Vinod Chandran K)

versus

1. The Chairman,
Central Board of Trustees,
Employees Provident Fund Organisation,
Bhavashyanidhi Bhavan,
14, Bhikaji Cama Place,
New Delhi : 110 066
2. Central Board of Trustees,
Employees Provident Fund Organisation,
Bhavashyanidhi Bhavan,
14, Bhikaji Cama Place,
New Delhi : 110 066,
Represented by its Secretary.
3. Central Provident Fund Commissioner,
Employees Provident Fund Organisation,
(Central Office), Bhavashyanidhi Bhavan,
14, Bhikaji Cama Place,
New Delhi : 110 066
4. Regional Provident Fund Commissioner,
Employees Provident Fund Organisation,
Regional Office, Bhavishya Nidhi Bhavan,
Pattom, Trivandrum.

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5. M.P. Goswami,
Assistant Provident Fund Commissioner,
Employees Provident Fund Organisation.
Raipur, Chattisgarh. Respondents.

(By Advocate Mr. N.N. Sugunapalan, Sr.)

This Original Application having been heard on 5.10.2006,
this Tribunal on .12.10.2006. delivered the following:

O R D E R
HON'BLE MR. K B S RAJAN, JUDICIAL MEMBER

"To pay or not to pay" is the question.

2. The applicant, retired on 28-02-2003 as Assistant Provident Fund Commissioner is aggrieved by non payment of arrears of salary in the promotional post of Asst. Provident Fund Commissioner w.e.f. 31-12-2001, the date when his immediate junior had assumed charges. Denial of the arrears was on the basis of "No work, no pay".

3. The facts of the case with terse sufficiency are as under:-

(a) The applicant joined the Employees' Provident Fund Organization as LDC in 1963 and in 1990 he was holding the post of Enforcement Officer on regular basis. His seniority position as per the list published by the respondents was 735. The next higher post in the ladder of promotion is Asst. Provident Fund Commissioner, for which the requisite eligibility criterion is seven years regular service in the cadre of E.O.



Thus, the applicant was eligible for consideration to the post of Asst. Provident Fund Commissioner from 1996.

(b) In 2001 when orders for adhoc promotion to the post of Asst. Provident Fund Commissioner were published, the applicant found some of his juniors having been promoted. Immediately, the applicant penned a representation in December, 2001, itself and followed up the same by expeditors. While the representations were not disposed of, the respondents published another seniority list of Enforcement Officers wherein certain officers who were earlier junior to the applicant were shown as seniors. This was specifically made available to the applicant and the applicant had made a representation on 20-09-2002 stating that his name in the seniority list of E.O. figured in serial 748 and that a number of his juniors have been promoted to the post of Assistant Provident Fund Commissioner and the applicant requested the authorities to consider his promotion to the said post. Immediately, by order dated 05-11-2002 (Annexure A-8) the applicant was promoted to the said post of Asst. Provident Fund Commissioner on ad hoc basis. However, as the juniors were promoted from an anterior date, the applicant requested claiming retrospective promotion w.e.f. December, 2001 and consequential benefits thereof. The applicant in the meantime retired on 28-02-2003. The applicant thereafter challenged the denial of promotion through this OA in 2004. However, during the pendency of this OA, respondents had issued order dated 02-06-2005 retrospectively promoting the applicant to the post of Asst. Provident Fund ^{Commissioner} ~~Officer~~ with effect from 31-12-2001, the date on which the immediate junior to the applicant was

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promoted. This order however, termed as notional promotion and thus denied the applicant the arrears of pay and allowances on the promotional post with retrospective effect from 31.12.2001. By an amended OA, this order of the respondents has also been challenged. The applicant, thus seeks the following main relief(s):-

- (i) To declare that the applicant is entitled to be promoted to the post of Assistant Provident Fund Commissioner from the date on which his immediate junior was promoted by Annexure A3 order dated 7.12.2001;
- (ii) To declare that the applicant is entitled to be granted all consequential benefits in the post of Assistant Provident Fund Commissioner, including back wages and allowances from 7.12.2001 onwards and fixation of pay in accordance with law.
- (iii) To declare that the applicant is entitled to get his retirement benefits including pension, gratuity and commutation of pension fixed in accordance with the refixation of his pay in the cadre of Assistant Provident Fund Commissioner.

4. Respondents have contested the OA. It has been stated in their reply that the applicant was not considered in the year 2001 as his name was mistaken as having retired from service and not on rolls. However, after rectifying the bonafide mistake he was considered in the next batch of promotions that were made on ad hoc basis in administrative exigencies. (Para 6 of the counter reply refers.) It has also been submitted by the respondents that since the applicant had already retired from service and he was holding the

b/w

post of Assistant Provident Fund Commissioner on adhoc basis, the arrears of pay and allowance claimed by him have not been allowed based on the principle 'No work, No pay'. Para 8 of the reply refers.

5. The counsel for the applicant submitted that the respondents have committed the mistake ^{by} not considering his case for promotion in 2001 and when the mistake has been pointed out, they have given promotion with notional fixation of pay only. The principle of 'no work no pay' will not apply in such cases where the individual is ready and available to perform the higher responsibilities but where the department did not allow him to work. In support of his contention, the counsel referred to the decision of the Hon'ble High Court of Kerala in the case of State of Kerala vs Bhaskaran Pillai, reported in 2003(1) KLT 60, para 11 of which reads as under:-

11. The first decision in which the matter received detailed consideration appears to be the one in Narayana Menon vs. State of Kerala, 1978 KLT 29. A Single Judge of this Court in that case considering the precedents on the point came to the conclusion that :

"A Government cannot be said to have forfeited his claim for arrears of salary when he did not get his due promotion for no fault of his". (emphasis supplied)

Later a Division Bench of this Court considered the same decision in Rajappan Nair vs. State of Kerala, 1984 KLT 14, and approved the conclusion of the Single Judge. The Division Bench made the following observation in paragraph 1 :-



" It quite often happens that a Government servant does not get his due promotion on the date he ought to have got it, but later it is given to him with retrospective effect from an earlier date. If for no fault of his, promotion to a Government is delayed and it is given to him with retrospective effect from the date on which it was due, the Government servant is naturally entitled to restoration of the benefits which he has lost not on account of his conduct or latches. It is only proper that the Government should restore to him all that is lost by way of salary or other emoluments." (emphasis supplied)

The Division Bench later proceeded to make the following further observations in paragraph 2 :-

"...We have found the State quite often taking a stand that even if a person is retrospectively promoted in recognition of his rights since the person so promoted had not actually worked in that post he is not entitled to the emoluments of that post. We have not been shown the support of any rule or logic to deny the benefit of the salary to the person so promoted. It may be that such delayed promotion was not on account of any fault of the Government, but on account of the conduct of the party himself. But in the normal run of cases where no such conduct can be attributed to the person who has lost the benefit of his appointment at the proper time when that is restored to him such restoration would be effective only if whatever would accompany that office would go to him. Otherwise it will only a partial restoration resulting in loss to the person, a loss which he is not bound to bear..." (emphasis supplied.)

6. Counsel for the respondent submitted that since the applicant had already retired and he did not work in the higher post in 2001 he is not entitled to arrears of pay and allowance.

7. Arguments heard and documents perused. The Apex Court



consistently holds that where the mistake is thoroughly on the part of the department, and the individual is always available and ready to work, the principle of 'No work No pay' cannot be pressed into service. In this regard the following decisions are appropriate to be referred to:-

(a) *Vasant Rao Roman v. Union of India, 1993 Supp (2) SCC 324*

SCC 324 is a case wherein the appellant, a driver in the Central Railway filed a case and the Tribunal allowed the petition and directed the respondents to fix the appellant's seniority as Shunter 'B' with effect from June 12, 1961 and as Driver 'C' with effect from December 17, 1965. The Tribunal further directed that the appellant's increments shall be granted and counted with reference to these dates of seniority in the higher grade, but he shall not get any arrears of emoluments. The applicant moved the Apex Court claiming that he was entitled to the arrears of emoluments also and there was no ground or justification to deny the same when he has been held entitled for seniority as Shunter 'B' and Driver 'C' with effect from the dates as mentioned above. The Apex Court has held as under:-

4. On the contrary, he (the appellant) had been made to suffer on account of administrative reasons for which the appellant was not responsible. The Tribunal itself has allowed the claim of the appellant regarding seniority over his juniors, considering force in the contention of the appellant. Thus, in the facts and circumstances of this case, we find no justification whatsoever for not allowing the arrears of emoluments to the appellant of the post of Shunter 'B' from June 12, 1961 and that of the post of Driver 'C' from December 17, 1965."

(b) *In J.N. Srivastava v. Union of India, (1998) 9 SCC 559*, the Apex Court has held:

"It was submitted by learned Senior Counsel for the



respondent-authorities that no back salary should be allowed to the appellant as the appellant did not work and therefore, on the principle of "no work, no pay", this amount should not be given to the appellant. This submission of learned Senior Counsel does not bear scrutiny as the appellant was always ready and willing to work but the respondents did not allow him to work after 31-1-1990.

(c) The above decision has been echoed in one of the latest decisions of the Apex Court in the case of ***Srikantha S.M. v. Bharath Earth Movers Ltd., (2005) 8 SCC 314***, wherein the Apex Court has observed as under:-

"The learned counsel for the respondent Company no doubt contended that after 15-1-1993, the appellant had not actually worked and therefore, even if this Court holds that the action of the respondent Company was not in consonance with law, at the most, the appellant might be entitled to other benefits except the salary which should have been paid to him. According to the counsel, the principle of "no work, no pay" would apply and when the appellant has admittedly not worked, he cannot claim salary for the said period.

29. *We must frankly admit that we are unable to uphold the contention of the respondent Company. A similar situation had arisen in J.N. Srivastava⁵ 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.*

(d) In the case of ***Punjab National Bank v. Virender Kumar Geel, (2004) 2 SCC 193*** the Apex Court has stated:-

"Mr Mukul Rohatgi, learned Additional Solicitor General submits that applying the principle of "no work no pay", back wages should not be allowed to them on their reinstatement. We are unable to accept this contention. The applicants were out of their jobs for no fault of theirs.



(e) In *P.S. Mahal versus Union of India, (1984) 4 SCC 545:*

Rules 2(iii) and 2(iv) of the Rules of 1976 were held to be violative of Articles 14 and 16 of the Constitution declared to be unconstitutional and void. Consequently, the seniority between Assistant Engineers and Assistant Executive Engineers regularly promoted within their respective quota was held to be determined by the length of continuous officiation in service in the grade of Executive Engineers, subject to the qualification that in case of Assistant Engineers the length of continuous officiation shall be reckoned from the date when their promotion is regularised by absorption within their lawful quota. The Apex Court therefore, allowed the writ petition and quashed and set aside the Memorandum and the seniority list dated August 14, 1975 and the Rules of 1976 and directed the Government to prepare a new seniority list of Executive Engineers and on preparation of such seniority list the cases of Assistant Engineers who would have been due for consideration for promotion as Superintending Engineers and thereafter as Chief Engineers on the basis of their revised seniority, was directed to be considered by a duly constituted Departmental Promotion Committee as on the dates on which they would have been due for such consideration if the correct seniority had been given to them, and if on the basis of their performance and record as on those dates they would have been selected for promotion, they must be given promotion with retrospective effect from such dates and if necessary, supernumerary posts in the grades of Superintending Engineers and Chief Engineers shall be created for the purpose of accommodating them and all arrears of salary and allowances were directed to be paid to the concerned individuals on the basis of such retrospective promotions.

(f) In the case of *Union of India v. K.V. Jankiraman, (1991) 4 SCC 109* the Court has held:

The normal rule of "no work no pay" is not applicable to cases such as the present one where the employee

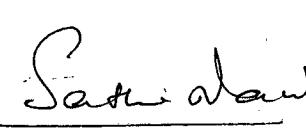
although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him.

8. In view of the above catena of decisions of the Apex Court, we have no hesitation to hold that the applicant is entitled to the arrears of pay and allowances in respect of the period from 31-12-2001 and to that extent the order dated 02-06-2005 shall be suitably modified by the respondents. Thus, the OA succeeds. Respondents are directed to pass suitable orders in this regard and afford the arrears of pay and allowances due to the applicant for the period from 31-12-2001 onwards in the scale attached to the post of Asst. Provident Fund Commissioner with interest @ 9% per annum from 01-01-2002 till date.

9. Under these circumstances, there shall be no orders as to costs.

(Dated, the 12th October, 2006)


K B S RAJAN
JUDICIAL MEMBER


SATHI NAIR
VICE CHAIRMAN

CVR.