

**CENTRAL ADMINISTRATIVE TRIBUNAL
CHANDIGARH BENCH
(orders reserved on 1.5.2019)**

**CP No.060/0141/2018 in
O.A.NO. 864/PB/2011 Date of order:- 10.5.2019.**

Coram: **Hon'ble Mr. Sanjeev Kaushik, Member (J)**
Hon'ble Mrs.P.Gopinath, Member (A).

Rakesh Kumar s/o Sh. Kishore Chand, retired Passenger Guard,
Northern Railway, Amritsar, r/o 27/1, B-22, Bassi Janna, Near Canal
Colony, Hoshiarpur(Punjab)-146001.

.....Petitioner.

(By Advocate :- Mr. R.K.Sharma)

Versus

1. Shri Vishvesh Chaubey, General Manager, Northern Railway,
Baroda House, New Delhi-110 001.
2. Shri Vivek Kumar, Divisional Railway Manager, Northern
Railway, Firozpur-150001.

...Respondents

(By Advocate : Mr. Puneet Jindal, Sr. Advocate with Mr. Lakhinderbir
Singh and Mr. Raghav Kakkar).

ORDER.

Sanjeev Kaushik, Member (J):

Petitioner has invoked contempt jurisdiction of this Court
under Section 17 of the Contempt of Courts (Central Administrative
Tribunal) Rules, 1992 read with section 11 of the Contempt of Courts
Act, 1971 alleging non-compliance and dis-obedience of directions of
this Court contained in its order dated 20.5.2015 and question is

whether the contemnors have violated the final order of this court intentionally and deliberately by flouting the same in toto.

2. Petitioner Rakesh Kumar approached this Court by filing O.A.No.864/PB/2011 seeking quashing of orders dated 8.4.2014 & 21.6.2010 (Annexures A-1 & A-2) vide which his claim for promotion to the post of Goods Guard had been rejected; order dated 15.6.2011 (Annexure A-3) whereby his claim for promotion to the post of Goods Guard was rejected in the selection held on 28.11.2010 & 2.1.2011 when there were 15 vacancies and out of that five were to be filled up from TNC cadre and six persons had qualified the written test and as per extent instructions circulated under PS No.13600/09, the panel was to be prepared as per merit and the name of the petitioner had been kept at sr.no.6, being lowest in merit and charge-sheet dated 8.7.2011 (Annexure A-4) vide which false and baseless allegations had been levelled against the petitioner of making a false complaint to Railway Minister despite the fact that there was conclusive proof against the private respondents of their involvement in corruption and irregularities in conduct of the departmental examination and charge-sheet had been issued with malafide intention of the respondents particularly respondents no.3 to 6 who had firstly managed things in a way that the applicant could not be promoted since 2005 itself and he had been charge-sheet which was nothing but a counter blast just to destroy the service career of the applicant and to silence the voice of a whistle blower. He further sought issuance of directions to the respondents to promote the applicant to the post of Goods Guard on the basis of

selection held in the year 2005, with all consequential benefits of seniority and arrears of pay and allowances with interest 18% per annum from the date the amount became due to the actual date of payment.

3. After exchange of pleadings, this Court finally, vide its order dated 20.5.2015, accepted the OA and directed the respondents no.1 & 2 to accord promotion to the applicant to the post of Goods Guard with effect from the date of promotion of the last candidate through 2005 examination and that he shall also be entitled to all consequential benefits. This order travelled to Hon'ble High Court in judicial review at the hands of the Railways in CWP No.7373 of 2016 which was decided by judgment dated April 25, 2016 where the orders of this Court was affirmed and the adverse inference drawn against the railway authorities was also upheld. In furtherance to the order of this Court, admittedly, the petitioner was granted promotion, but on notional basis. Aggrieved against the action of the respondents in not complying with the order of this Court in not granting him the actual benefit, as directed by this Court, the present contempt petition has been filed.

4. This Court after noticing the contention of the petitioner based upon the judgment passed by the Hon'ble Apex Court in the case of **State of M.P. & Another** versus **Suresh Narayan Vijayvargiya & Ors.** (2014(3) S.C.T. Page 27) issued notice to the respondents.

5. The respondents on notice, filed compliance affidavit. Pending contempt petition, the petitioner has also moved Misc. Application for placing on record letters bearing No.831E/63-2XII/D/E.40 dated 16.7.2003 and 2.7.2003 and a copy of judgment passed by the Hon'ble Apex Court in the case of Union of India & Ors. Versus P.O. Abraham & Ors. (Civil Appeal No.8904 of 1994) decided on 13.8.1997. The respondents filed their affidavit by annexing para 228 of the Indian Railway Establishment Manual Volume I and have submitted that in compliance of order of this Court, the petitioner was promoted as Goods Guard vide letter dated 19.12.2016 after successfully completing the pre-requisite course with effect from 10.8.2016 to 6.10.2016. The applicant was granted promotion as Goods Guard with effect from the date the last candidate who qualified the 2005 examination and his pay has been fixed on proforma basis with effect from 12.7.2006 vide order dated 28.2.2017 and the arrears have been granted with effect from the date he actually shouldered the duties of Goods Guard i.e. with effect from 19.12.2016. Thus, the respondents have prayed since the order of this Court has been complied with, therefore, no contempt is made out as alleged by the petitioner.

6. We have heard the learned counsel for the parties at considerable length.

7. Shri R.K.Sharma, learned counsel for the petitioner vehemently argued that the respondents have not faithfully complied with the order of this Court. He argued that though in terms of order of this Court, the petitioner has been given promotion from the date

when the last candidate of the 2005 examination was given benefit, but the petitioner has not been given the actual benefit as directed by this Court while allowing the OA, as it was ordered that the applicant therein (petitioner herein) is entitled to all consequential benefits. He argued that once it was held that the petitioner is entitled for all consequential benefits, then the respondents while relying upon para 228 of IREM cannot deny him the actual benefit because that para, in no way, is applicable in the given facts of the present case. He further argued that this Court after recording a finding against the respondents, as alleged by the petitioner herein, of illegally withholding his promotion, allowed the OA and the order of this Court has recorded the findings against the respondents for illegally withholding his promotion which has also been affirmed by the jurisdictional High Court. Thus, he submitted that by invoking para 228 of IREM, which is otherwise not applicable in the case of the petitioner, the respondents cannot deny him the actual benefits flowing from the date of his promotion because it was not his mistake or there was nothing against the petitioner at that time when his promotion was held. Thus, he submitted that the action of the respondents in not granting him actual benefits is contemptuous and for that, the respondents are liable to be punished as envisaged under the Contempt of Courts Act, 1971.

8. To buttress his plea, he placed reliance upon judgment passed by the Hon'ble Apex Court in the case of **State of Madhya Pradesh & Another** versus **Suresh Narayan Vijayan Vijayvargiya & Ors.** (2014(11) S.C.C. Page 694), wherein in para

14, the Lordships while considering the scope of contempt have recorded their finding that once the court passes an order, the parties to the proceedings before the Court cannot avoid implementation of that order by seeking refuge under any statutory rule and it is not open to the parties to go behind the orders and truncate the effect of those orders. He further placed reliance upon a judgment passed by the Hon'ble Apex Court in the case of **State of Kerala & Ors. Versus E.K.Bhaskaran Pillai** (2007(6) S.C.C. Page 524) where the Lordships have held that the principle of no work no pay cannot be accepted as a rule of thumb and then in the case of **Ramesh Kumar versus Union of India & Ors.** (2015(14) S.C.C. Page 335) where also the Court while relying upon the judgment passed in the case of E.K.Bhaskaran Pillai(supra) has negated the view by the respondents for not granting the back wages on the principle of no work no pay. He further cited the judgment passed by the Division Bench of the jurisdictional High Court in the case of **HVPNL Panchkula & Ors. Versus Smt. Sheelwanti** (LPA No.1193 of 2017) decided on 1.8.2018 where the jurisdictional High Court, after placing reliance on a judgment passed in the case of E.K.Bhaskaran Pillai(supra) has recorded a finding that if the employee is denied the benefit for which he was legally entitled to, the respondents cannot be allowed to say that he is not entitled to back wages on the principle of 'no work no pay'.

9. Shri Puneet Jindal, Senior Advocate along with Mr. Lakhinderbir Singh, Advocate, for the respondents vehemently opposed the prayer and have submitted that the plea as raised by

the petitioner in the present contempt petition, does not fall within the scope of contempt proceedings. He submitted that once they have complied with the order of this Court by granting him ante-dated promotion on notional basis and actually from the date of shouldering the higher duties and responsibilities denying him the back wages from retrospective date by passing an order, then this Court in contempt proceedings cannot look into the legality of that order and if the petitioner is still aggrieved, he can knock the door of this Court again by filing petition on original side impugning that order. In this behalf, he placed reliance on a judgment passed by the Hon'ble Apex Court in the case of **State of J & K versus Sayeed Zaffar Mehdi** (1997(() S.C.C. Page 640).

10. On merit, he argued that para 228 of IREM empowers the railway authorities to rectify their mistake if the respondents have erroneously not promoted a person at the relevant time and as per that para, when a person has not actually worked, the railways can deny the benefit of pay and allowances.

11. We have given our thoughtful consideration to the entire matter and with the able assistance of learned counsel for the parties, perused the judgments cited by them.

12. As noticed herein above, we have to examine, whether there is a deliberate attempt by the contemners to over-ride the orders of this Court in implementing the same as per spirit of the order. To come to a final conclusion, the operative part of the order passed by this Court and the Hon'ble High Court need to be extracted hereunder :-

" 5. Annexure P-2, also filed as Annexure A-28, as well as Annexure A-127 (both official communications), show that the applicant was duly selected for the aforesaid post in the 2005 exam. However, as alleged by the applicant, he was unduly denied the promotion. The respondents are not in a position to controvert the said allegation. That the applicant also appeared in exams held in 2008 onwards, but could not qualify, cannot be said to wash away his success in the 2005 exam. The said subsequent exams were also under a cloud. Further, the charges in the memo dated 08.07.2011 (Annexure A-4) against the applicant were made much later than the 2005 exam, nay, the same remained unsubstantiated, vide the enquiry report dated 19.3.2012 and the case was ' filed', vide the order dated 26.4.2012(Annexure A-40).

6. In view of the above, we feel that the applicant has been wronged by the respondents and his O.A. deserves to succeed. Therefore, we direct the respondents nos. 1 and 2 to accord the applicant promotion to the post of Goods Guard w.e.f. the date of promotion of the last candidate through the 2005 exam. He shall also be entitled to all consequential benefits".

" CWP No.7373 of 2016

" The Union of India and Railway Authorities have challenged the order dated 20.05.2015 (Annexure P-10) passed by the Central Administrative Tribunal ('CAT' for short), Chandigarh Bench, vide which direction for the promotion of respondent No.1 to the post of Goods Guard has been issued.

The facts are not in dispute. First respondent appeared in the competitive selection process held in the year 2005 and based upon his performance in the written examination, was apparently placed at number 30 in the order of merit. This fact is discernible from the document Annexure A-2, which is an official communication and has been appended by first respondent with his Original Application.

Since the petitioner-authorities took a stand before the Tribunal that only 30 officials were to be promoted and the first respondent did not make it as per his merit in the written test, the Tribunal called for the original record of the selection. In response thereto, the petitioners took a plea that the records are "untraceable".

In these circumstances the Tribunal was left with little choice except to rely upon the communication Annexure A-2 and accept the claim of first respondent.

We have asked learned counsel for the petitioners as to whether the missing record is traced out and can be produced? He candidly admits that the record not is traceable. The plea taken by the petitioners before the Tribunal has to be viewed in the light of serious allegations made by the mother of first respondent in her complaint Annexure A-6 alleging corruption and demand of bribe by two members of the selection committee. Not only this, respondent No.1 arrayed these two members of the selection committee as respondents in their personal capacity before the Tribunal.

It appears to us that the record of the selection has not been produced before the Tribunal in collusion and in connivance with members of the Selection Committee and some of the selected candidates. Had the record been produced, the claim of respondent No.1 would have been fortified. In these circumstances, the adverse inference drawn by the Tribunal against the authorities, calls for no interference.

Dismissed."

Perusal of the above extracted part of the order passed by this Court and the judgment passed by the Hon'ble High Court, leaves no manner of doubt that the allegations levelled by the petitioner (applicant in the OA) of illegally and arbitrarily in not granting him promotion from due date found favour by this Court and ultimately the Hon'ble High Court has also accepted the allegations levelled by the petitioner and his mother against the respondents Screening Committee for illegally and arbitrarily declaring the petitioner not eligible for promotion to the post of Goods Guard at the relevant time as the respondents failed to produce the record before this Court, therefore, adverse inference was drawn against them. Thus, it is proved on record that the petitioner was illegally and in an arbitrary

exercise of power, at the hands of the railway authorities, was deprived of his promotion as Goods Guard in the year 2005, which ultimately was granted with the intervention of this Court in the year 2016 though with effect from 19.3.2012, but without there being arrears of pay i.e. on proforma basis and actually with effect from 12.7.2006. It is well established in service jurisprudence that once a person has been deprived of his legitimate right, which was later on found to be illegal and arbitrary exercise of power by the department in not allowing the employee to discharge his duties on a higher post or to join duties on higher post, the court will strike a balance by directing the employer to pay back wages for the period when an employee who was ready to work, but was not allowed to work in an illegal manner to compensate him. It is equally settled starting from the case of O.P.Gupta versus State of Haryana that if a person did not discharge higher duties or shoulder duties of higher post, then he cannot claim wages for the said period and he can be given notional fixation of pay from the date of his promotion till he actually shoulders that duty. But this principle cannot be accepted as a rule of thumb and the matter will have to be considered on a case to case basis. In the case of E.K.Bhaskaran Pillai(supra), the Lordships have recorded their finding as under:-

“ We have considered the decisions cited on behalf of both the sides. So far as the situation with regard to monetary benefits with retrospective promotion is concerned, that depends upon case to case. There are various facets which have to be considered. Sometimes in a case of departmental enquiry or in criminal case it depends on the authorities to grant full back wages or 50 per cent of back wages looking to the nature of delinquency involved in the matter or in criminal cases

where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes in the matter when the person is superseded and he has challenged the same before court or tribunal and he succeeds in that and direction is given for reconsideration of his case from the date persons junior to him were appointed, in that case the court may grant sometimes full benefits with retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. However, it is very difficult to set down any hard and fast rule. The principle "no work no pay" cannot be accepted as a rule of thumb. There are exceptions where courts have granted monetary benefits also".

This findings by the Lordships has consistently been followed in the subsequent judgment namely Ramesh Kumar (supra). Not only this, the jurisdictional High Court by following the law laid down in the case of Bhaskaran Pillai (supra) have allowed back wages in the case of Smt. Sheelawanti(supra). The findings so recorded by the High Court are extracted hereunder:-

" 12. The Hon'ble Apex Court has made a categorical observation, which has been quoted herein above, that the principle of "no work no pay" would not be attracted where respondents were at fault in not considering the case of the appellant for promotion and in not allowing the appellant work on the post carrying a higher pay scale. Applying the aforesaid ratio laid down by the Hon'ble Apex Court, we find that learned single Judge, in the facts and circumstances of the case, has rightly allowed the writ petition and no fault can be found with the impugned judgment which may require any interference".

Thus, it can safely be concluded from the arguments raised by the respondents that principle of 'no work no pay' cannot be accepted in the present case because the petitioner was not promoted to the post of Goods Guard for which he was legally entitled to, in an arbitrary manner, at the hands of the respondents, which was

ultimately not approved by this Court and petitioner was allowed due benefits. Therefore, it is not the case that the petitioner was not ready, at the relevant time, to discharge the duties of higher post or to shoulder the responsibilities of higher post, rather, he was denied the said promotion at the hands of the respondent railways and as such, they cannot take benefit of their own wrong.

13. The second argument raised by the respondents that they can deny the back wages in terms of para 228 of IREM Volume I cannot be accepted because that is not applicable in the given facts of the case. Heading of para 228 starts from 'Erroneous Promotions' and perusal of that para clearly stipulates that due to some administrative errors, staff are over-looked for promotion to higher grades could either be on account of wrong assignment of relative seniority of the eligible staff or full facts not being placed before the competent authority at the time of ordering promotion or some other reasons. Para 228 of IREM is relevant for adjudication of the controversy, reads as follows:-

"228. Erroneous Promotions.(I) Sometimes due to administrative errors, staff are over-looked for promotion to higher grades could either be on account of wrong assignment of relative seniority of the eligible staff or full facts not being placed before the competent authority at the time of ordering promotion or some other reasons. Broadly, loss of seniority due to the administrative errors can be of two types :

- (i) Where a person has not been promoted at all because of administrative error, and
- (ii) Where a person has been promoted but not on the date from which he would have been promoted but for the administrative error. Each such case should be dealt with on its merits. The staff who have lost promotion on account of administrative error should on promotion be assigned correct seniority vis-a-vis their juniors

already promoted, irrespective of the date of promotion. Pay in the higher grade on promotion may be fixed proforma at the proper time. The enhanced pay may be allowed from the date of actual promotion. No arrears on this account shall be payable as he did not actually shoulder the duties and responsibilities of the higher posts.

(II) In pursuance of Rule 1326-R.II, 1987 Edition the following provisions shall govern the pay and increments of the Railway servant whose promotions or appointments in a substantive or officiating capacity to a post is later found to be erroneous on the basis of facts-

(a) The orders of notification of promotion or appointment of a railway servant should be cancelled as soon as it is brought to the notice of the appointing authority that such a promotion or appointment has resulted from a factual error and the railway servant concerned, should, immediately on such cancellation, be brought to the position which he would have held but for the incorrect orders of promotion or appointment.

In the case, however, of a railway servant, who has been erroneously promoted and appointed to a post in a substantive capacity, procedure prescribed in Board's letter No. E5O/RCI/16/3 dt. 23-7- 1954 for rescinding the irregular confirmation of a railway servant should be followed/and only thereafter the railway servant concerned should be brought down to the position which he would have held but for the erroneous promotion/ appointment by the issue of orders as mentioned above. Service rendered by the Railway servant concerned in the post to which he was wrongly promoted/appointed, as a result of the error should not be reckoned for the purpose of increments or for any other purpose in that grade/post to which he would not normally be entitled but for the erroneous promotion/appointment.

(b) Any consequential promotion or appointments of other railway servants made on the basis of the incorrect promotion or appointment of a particular railway servant will also be regarded as

erroneous and such cases also will be regulated on the lines indicated in the preceding paragraph.

(c) Except where the appointing authority is the Railway Board or the President, the question whether promotion/appointment of a particular railway servant to a post was erroneous or not should be decided by an authority next higher than the appointing authority in accordance with the established principles governing promotions / appointments. Where the appointing authority is the Railway Board or the President, the decision should rest with the President and shall be final.

(d) Cases of erroneous promotion/appointment in a substantive or officiating capacity should be viewed with serious concern, and suitable disciplinary action should be taken against the officers and staff responsible for such erroneous promotion or appointment. The orders refixing the pay should be issued expressly under Rule 2927-R.II."

As noticed herein above, this is not the case of erroneous promotion or where the claim of the petitioner has been over-looked while considering the case of promotion. It is a case of deliberate attempt by the respondents in not giving him due promotion which ultimately found favour by this Court by allowing his OA, and once there is judicial verdict in his favour, then para 228 would even otherwise be of no help to them.

14. Thus, we have no hesitation in our mind to conclude that the respondents have not implemented the order of this Court in toto by not granting him actual benefits arising from the due date and by wrongly applying the principle of no work no pay and secondly, the arguments of the respondents that this court cannot look into legality of order in view of para 228 of IREM cannot be accepted

because the violation of order passed by this Court is on the face of it for which the respondents cannot escape from their liability by implementing the order in toto and we can lift the veil to find out the real intention of the respondents behind passing of the order as to whether it is in the nature of camouflage to subvert the directions. Thus, the respondents are held guilty for not implementing the order and they are granted further two weeks time to implement the order failing which contemnors/respondents shall remain present in court for framing of charges against them.

15. List on 30.5.2019.

(SANJEEV KAUSHIK)
MEMBER (J)

(P.GOPINATH)
MEMBER (A).

Dated:- 10.5.2019.

Kks