

confirmed, deputed for the courses and also allowed to cross the efficiency bar, was also relevant. The power under rule 9.18 has to be exercised in public interest. The authority charged with the duty of final order has to see as to whether or not an officer's value 'is clearly' incommensurate with the pay which he draws. It is the cumulative effect of the positive and negative aspects that has to be taken into account while deciding the matter. While the negative aspect is clearly considered, the positive aspect was clearly ignored and consideration was thus not proper.

(10) Accordingly the writ petition is allowed and the impugned order of retirement of the petitioner is set aside. In the circumstances of the case, the parties are left to bear their own costs.

S.C.K.

Before Hon'ble A. P. Chowdhri & Jawahar Lal Gupta, JJ.

BIR SINGH KADIAN AND OTHERS,—*Petitioners.*

versus

STATE OF HARYANA AND ANOTHER,—*Respondents.*

C.W.P. 12568 of 1993

26th April, 1994

Constitution of India 1950—Arts. 226/227—Employees. granted promotion with retrospective effect—Claim for refixation of their pay, pension etc.—Tenability of such claim.

Held, that whenever a person is found entitled to the grant of retrospective promotion, he is entitled to the refixation of his pay and the grant of arrears of salary.

(Para 9)

Further held, that it is only on account of either the failure of the respondents to act in accordance with the Rules or the pendency of litigation that the orders of their promotion with effect from the due dates or posting were not issued. As a result, they were deprived of the right to work on the higher posts. If the petitioners had refused to work on the higher posts in spite of the fact that orders of their promotion and posting had been issued, it may have been possible for the respondents to contend that they are not entitled to the arrears of salary. However, this is not the position.

(Para 7)

Harish Rathee, Advocate, for the Petitioner.

R. C. Setia, Addl. A.G. Haryana, for the Respondent.

JUDGMENT

Jawahar Lal Gupta, J.

(1) Are the petitioners who have been granted promotion,—*vide* order dated November 30, 1992, with retrospective effect entitled to the refixation of their pay, pension, gratuity and the payment of the arrears of salary etc.? This is the short question that arises for consideration in this case.

(2) The petitioners had initially joined service as Junior Engineers. They were ordered to be promoted to the posts of Sub-Divisional Engineers on January 28, 1982. However, on account of litigation that ensued, orders of posting were not issued. As a result, the petitioners could not work on the higher posts.

(3) The litigative process finally ended on November 11, 1992, when their Lordships of the Supreme Court gave certain directions in petitions arising out of Civil Appeal No. 3837 of 1990. There after, the State of Haryana issued an order dated November 30, 1992, by which various persons including the petitioners were promoted retrospectively with effect from various dates. However, in this order it was *inter alia* mentioned that “the officers who have been given earlier deemed dates of promotion will not be paid any arrears of pay and allowances.” The petitioners are aggrieved by this stipulation in the order.

(4) We have heard learned counsel for the parties, Mr. Harish Rathee, learned counsel for the petitioners has contended that the petitioners were illegally denied the right to work on the higher posts and that during the pendency of the litigation, they had even retired from service. However, their claim for retrospective promotion having been sustained even by their Lordships of the Supreme Court, the consequential benefits ensuing there from cannot be denied, and the petitioners have a right to the payment of arrears of salary as well as the redetermination of the retiral benefits. On the other hand, Mr. R. C. Setia, learned counsel for the respondents has contended that the principle of ‘no work no pay’ has been duly recognised by Courts and since the petitioners had not actually discharged their duties of higher posts, they cannot claim the salary therefore,

(5) It is the admitted position that the petitioners had never refused to work on the higher posts. It is only on account of either the failure of the respondents to act in accordance with the Rules or the pendency of litigation that the orders of their promotion with effect from the due dates or posting were not issued. As a result, they were deprived of the right to work on the higher posts. If the petitioners had refused to work on the higher posts in spite of the fact that orders of their promotion and posting had been issued, it may have been possible for the respondents to contend that they are not entitled to the arrears of salary. However, this is not the position. Accordingly, on principle we find that there is no basis for the impugned stipulation in the order dated November 30, 1992.

(6) Still further, it is clear that it is in compliance with directions of their Lordships of the Supreme Court that the orders of promotion have been issued. In fact the controversy regarding the interpretation of rules and instructions had existed which was resolved by their Lordships of the Supreme Court,—*vide* Judgment dated August 7, 1990, in Civil Appeal No. 3837 of 1990. Still, the directions were not complied with and various interlocutory applications and contempt petition No. 79 of 1991 were filed. These were disposed of by their Lordships,—*vide* order dated November 11, 1992. It was in pursuance to the directions given by their Lordships that the petitioners were promoted. They were thus entitled to be promoted with effect from the dates now assigned by the respondents. If the arrears of salary and other consequential benefits are now denied to the petitioners, they would have fought and waited in vain. This would be unjust and unfair. Such is not the position of law. We cannot persuade ourselves to hold that even though the denial of promotion in the year 1980 or thereafter was wholly illegal, the officers shall not be entitled to arrears of salary because they were not permitted to work on the higher posts. It would be adding insult to injury.

(7) There is another principle. Lord Asquith in *East End Dwellings Co. Ltd. v. Finsbury Borough Council* (1), 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.

(1) (1932) A.C. 109.

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.”

It is no doubt true that his Lordship was speaking of legal fiction in the construction of a Statute. However, there is no reason why this principle should not apply in the case of an order issued by the State Government. If a person is deemed to have been promoted with effect from a particular date, he should normally be deemed to have held and worked on the higher post. He should also be, thus, entitled to the payment of arrears of salary.

(8) The right of the employee to get pay of the higher post has been now recognised by their Lordships of the Supreme Court in *Union of India etc. v. K. V. Jankiraman* (2). Even the doubt which was created by the judgment in *Paluru Ramkrishnaiah and others v. Union of India and another* (3), has now been clarified.

(9) Accordingly, we hold that whenever a person is found entitled to the grant of retrospective promotion, he is entitled to the refixation of his pay and the grant of arrears of salary. The question posed at the threshold is answered accordingly.

In view of the above, this writ petition is allowed. The impugned stipulation in the order is set aside. The respondents are directed to refix the pay of the petitioners and pay them all arrears of salary. Even their pension and gratuity shall be refixed and arrears paid. The needful shall be done within a period of three months from the date of receipt of a copy of this order. In the circumstances of the case, there will be no order as to costs.

S.C.K.

(2) A.I.R. 1991 S.C. 2011.

(3) 1990 (1) R.S.J. 238.