

(1965) 03 KAR CK 0003
In the Karnataka High Court
Case No : Writ Petition No. 57 of 1963

Rahamathunisa Begum

APPELLANT

Vs

State of Mysore and Others

RESPONDENT

Date of Decision : 26-03-1965

Acts Referred:

Constitution of India, 1950 — Article 13, 18, 227

Citation : AIR 1966 Kar 211

Hon'ble Judges : K.S. Hegde, J;C. Honniah, J

Bench : Division Bench

Judgement

Hedge, J.

(1) In this writ petition under Art. 227 of the Constitution the petitioner prays for the following reliefs.

"i. to issue a writ of Mandamus and/or any other appropriate writ or direction as the case may be that the petitioner's promotion as District Educational Officer should be deemed from 10-10-52 when the registered respondent was appointed as D.E.O and her promotion as Deputy Director be deemed to be from July 1957 when the 3rd respondent was so appointed and she should be reinstated as Deputy director in one of the posts of Deputy Directors by reverting the juniormost Deputy Director as D.E.O. passing order to that effect.

ii. to issue a similar writ directing that the petitioner be paid the difference of pay between that of D.E.O and of headmistress between 10-10-52 to 28-7-54 the date when she was appointed as Dist. Educational Officer and the difference in pay between that of the Deputy Director from July 1957 when the 3rd respondent was so appointed and the pay of the District Educational Officer.

iii. to pass all further consequential directions and orders as may meet the ends of justice including the award of costs of this petition."

(2) A preliminary objection was raised on behalf of respondents 1 and 2 to the

effect that the reliefs prayed for in this petition should be denied to the petitioner on the ground of laches. We propose to consider this preliminary objection first.

(3) We shall now state that facts necessary for considering the preliminary objection raised. The petitioner entered Government service in the Department of Education of the erstwhile State of Mysore on 3-11-1932 Respondents 3 to 8 entered service. Hence she is senior to respondents 3 to 8. At the time she entered service there was a Rule to the effect that no lady should be promoted as a District Educational Officer. Even after the Constitution came into force this Rule was not altered in view of the said Rule respondent 3 and one Thimmiah who were junior to the petitioner were promoted as D.E.Os on 10-10-1952. The said Thimmiah had retired before the filing of this petition. One Kalappaji who was also junior to the petitioner who has since retired was promoted as D.E.O. on 4-12-1952. The 4th, 5th, 6th, 7th and 8th respondents were promoted as D.E.Os on 5-12-1952, 3-1-1953, 5-4-1954, 2-7-1954 and 7-7-1954 respectively. Meanwhile the petitioner was agitating for her promotion. She was urging on the Government that the rule which prohibited the promotion of ladies as D.E.Os is an invalid rule in view of Art. 18 of the Constitution. Finally, her plea was accepted and she was promoted as a D.E.O. on 28-7-1954. But it was not given any retrospective effect. It came into effect from 28-7-1954. Therefore, as D.E.O., she happened to be junior to respondents 3 to 8. She was temporarily (sic) as a Deputy Director of Public Instruction was reverted to her substantive post on 9-12-1962. It is only thereafter she filed this petition on 15th January 1963. The question for consideration is whether in view of this petition on 15th January 1963. The question for consideration is whether in view of this inordinate delay we should grant the petitioner the reliefs prayed for by her assuming that the rule which prohibited the promotion of ladies as D.E.Os became void on 26-1-1950.

(4) It may be noted that two of the juniors of the petitioner who had been promoted as D.E.O.s in preference to her had retired even before this petition was filed. If the petitioner had come to this court at the appropriate time and if she had succeeded in establishing her case, then such of her juniors who had been promoted by that time would have had to yield place to her others would not have been promoted in preference to her. The promoted persons had either occupied the posts of D.E.Os or of the Deputy Director of Public Instruction for a considerable time. They have drawn the salary due to those offices. Further, they are entitled to the benefits which are incidental to the offices held by them. It is not possible now to put the clock back. The excess salary paid other benefits accrued to them cannot be touched. All these things would not have happened had the petitioner been diligent in asserting her right.

(5) It may be further noted that the claim made by the petitioner in relief 2 is long barred by time. She is not in a position today to enforce her claim by means of a suit. Hence the question that falls for decision is whether this court in its discretion should grant to her reliefs prayed for when she had slept over her

rights for over eleven years. Few cases of this type would have come up before courts.

(6) Now let us see whether the petitioner had offered any satisfactory explanation for this inordinate delay in approaching this court. In the affidavit filed in support of the petition no explanation whatsoever was offered. Thereafter on 23-1-1963, she has filed an additional affidavit. Therein also no explanation was offered. All that is stated in paragraph 3.

"I am also filing herewith true copies of the several written representations submitted by me in chronological order marked as Exhibits "A1 series" as follows:

A-1 Representation dated 2-10-1952

A-2 do 17-12-1952

A-3 Memo dated 19/21st May 1953 Calling for the explanation of the petitioner as to why she submitted directly to Govt.

A-4 Representation dated 9-3-1953

A-5 do 10-1-1956

A-6 do 16-6-1957

A-7 do 7-1957

A-8 do 4/7-9-1957

A-9 do 16-5-1960

At best these averments show that the petitioner was repeatedly representing her case to the Government.

(7) In *Kamamma v. State of Mysore* AIR 1960 Mys 255 this court had to consider whether a delay of three years in approaching this court is a good ground for refusing to grant the reliefs prayed for. Dealing with that aspect *Hombe Gowda J* (as he then was) speaking for the Bench observed thus:

"There is one other ground in which the petition is liable to be dismissed namely, the inordinate delay in moving this court under Art. 226 of the Constitution. It is no doubt true that the rules which applied to civil suits and appeals do not apply to application for Writs. But the fact remains that the party aggrieved and who invokes the extraordinary jurisdiction of this Court should do so at the earliest opportunity, at any rate, within a reasonable period from the date of the order which affects him.

The order impugned in this case was passed on 5th June 1956 and by that order the seniority that was claimed was invalid as being manifestly unjust. Once the Government passed the order which materially affected the seniority of the petitioner nothing thereafter remained to be done. Admittedly there is no provision for preferring an appeal or revision or an application for review to the Government against the

order.

The petitioner should have moved this Court for issue of an appropriate Writ within a reasonable time. She did not do so till March 1959, i.e. nearly for three years. The fact that the petitioner sent up a memorial or submitted representations for reconsideration of the case to the Government does not excuse the delay. In this circumstances this Court, in my opinion cannot be called upon to grant any relief in its extraordinary discretion conferred by Art. 226 of the Constitution when an aggrieved party comes after such a long delay. The petition is liable to be dismissed on this ground also."

(8) But it was urged by Mr. S.K. Venkataraga Iyengar that the decision in Kamalamma's case AIR 1960 Mys 255 dealt with a rule which did not affect the fundamental right of the petitioner therein, whereas in the present case, what is complained of by the petitioner is an infringement of a fundamental right. Since no question of delay arises for consideration. We think Mr. Iyengar is not right in contending of any infringement of her fundamental right what she is really complaining of is that the promotion due to her was denied to her because of an archaic rule which prohibited ladies being promoted as D.E.Os. According to the petitioner, that rule became void on 26-1-1950 in view of Art. 15 of the Constitution If Mr. Iyengar's contention is accepted as correct, the rule in question was honest on and after the commencement of the Constitution. In the eye of law that rule dismissed no exist. Article 13 of the Constitution lays down that:

"All laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void."

If the contention of Mr. Iyengar that the rule which prohibited the promotion of ladies to the post of D.E.Os is in conflict with the guarantee contained in Art. 15 is correct, that rule became void under Art. 13 on 26-1-1950. Thereafter if the petitioner's case was not considered for promotion when her juniors were promoted, then it was a breach of the service rules and no question of infringement of her fundamental rights arises.

(9) We shall still examine the correctness of the contention of Mr. Iyengar that whenever an infringement of a fundamental right is established, the question of delay in approaching the court does not arise for consideration at all. If this contention is correct, a citizen whose fundamental right was infringed on or after 26-1-1950 can approach the High Court even after 50 years or more--a proposition which can hardly be accepted without compelling reasons Acceptance of that contention leads to the conclusion that there are two kinds of writs under Art. 226 of the Constitution namely (1) writs which can be asked for as of right (2) discretionary writs. The language of Art. 226 does not justify such a position. It plainly says:

"Notwithstanding anything in Art. 32, every High Court shall have power,

throughout the territories in relation to which it exercised jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by part III and for any other purpose."

A Bench of this Court rejecting the contention advanced before it that under Art. 226 some writs are writs as of right and some are discretionary writs observed in *Dr. P.S. Venkataswamy Setty v. University of Mysore* 1963(2) Mys LJ 383 : AIR 1964 Mys 159 as follows:

"In India there is not anything like a writ of right, because the issue of any type of writ, order or direction under Art. 226 is a matter of discretion with the Court."

(10) It is within the discretion of this Court to issue a writ or not. It is undoubtedly true that the discretion of this Court is not an arbitrarily discretion. It is regulated by well acceptance principle. If a party does not move the High Court within a reasonableness of the period in a given case depending on its own facts the High Court would decline the relief prayed for. This would be so whether the relief prayed for by him relates to a fundamental right or otherwise.

(11) In support of his contention that when a party comes to the Court complaining of infringement of his fundamental right no question of delay arises for consideration. Mr. Iyengar read to us a number of decisions. Most of them in our judgment, do not even bear on the question for decision. All the same, we shall examine them presently.

(12) The first decision read to us is the decision of this Court in *Sankappa Rai v. State of Mysore* (1960) 38 Mys LJ 769 wherein this court laid down that

"Where there is continuous violation of fundamental rights, the conduct of the petitioner even though it may debar him from reopening acts which had already been done, will not prevent him from obtaining the relief in respect of future encroachment of such fundamental rights."

Therein what had happened was that in pursuance of a scheme framed by the Hindu Religious Endowment Board, Madras properties of a trust of which the petitioners were trustees, had been removed from the possession of the trustees and out in the possession of an Executive Officer. There was no dispute that the scheme framed was void in law. Therefore the possession of the trust property by the Executive Officer was a continuing wrong--a continuing infringement of a fundamental right. That being so, the Court held that though the petitioners were disentitled to any relief in respect of the continuing infringement of their fundamental right. This decision in our opinion instead of supporting the contention of the petition is an authority for the proposition that laches on the part of the petitioner is a good ground for refusing to grant the reliefs prayed for by him even if he comes up with a complaint of infringement of his fundamental

right. That was also the view taken by this Court in *Revanna Siddaswami Hiremuti v. State of Mysore* ILR (1965) 203.

(13) We fail to see why Mr. Iyengar found it necessary to refer us in the decision of this Court in *Manohar Vinayak v. Collector of Central Excise Bangalore* (1961) 39 Mys LJ 622 : AIR 1961 Mys 263. There in Mr. Iyengar's contention that the delay in filing the writ petition should not be taken into account was negated by this Court and the petition was dismissed on the sole ground that it was a highly belated petition.

(14) A great deal of reliance was placed by Mr. Iyengar on the decision of the Madhya Bharat High Court in *Haji Suleman Yusuf Bhat v. Custodian of Evacuee Property, Madhya Bharat* AIR 1954 MP 173. In the court of his judgment Khan J. observed to the effect that whenever there is an infringement of fundamental right no question of delay arises for consideration. This objection is clearly an *Obiter Dicta*. With respect to the learned Judge, we are unable to agree with these observations.

(15) Next reference was made to the decision of the Supreme Court in *The Amalgamated Coalfields Ltd. and Others Vs. The Janapada Sabha, Chhindwara*, . We fail to see what assistance the petitioner gets from this decision. The only paragraph in that decision read to us is para 6(2). That paragraph reads:

"Assuming the levy was valid when originally imposed, it ceased to be legal after the coming into force, first of the Government of India Act, 1935 and later of the Constitution of India in 1950 under which the tax in question or some portions of it became exclusively leviable by the Central or Union Government and would not be covered by the saving as to previously existing taxes in S. 143 of the Government of India Act, 1935 and subsequently of Art. 277 of the Constitution."

(16) Then reference was made to the decision of the Supreme Court in *re Kerala Education Bill 1957* AIR 1958 SC 956. Barring making a reference to the decision, our attention was not drawn to any passage in that decision which can be said to be of assistance to the petitioner in this case. We also do not think that the decision of the Supreme Court in *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, bears on the point under consideration. The passage read to us relates to the question whether on the facts of that case a waiver could be inferred. Similarly the decision of the Supreme Court in *Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others*, has no relevance of our present purpose.

(17) The last decision read to us is the decision of the Madhya Pradesh High Court in *Gajraj Singh Bheru Singh Rajput Vs. State of M.P. and Others*, . In para 3 of that judgment the court observed.

"The appellant's contention in regard to delay is that he had been petitioning the Government because having been appointed by the Ruler, he felt that the Government alone was the proper authority that could punish him. Secondly

even if there was delay, his conduct does not show acquiescence in the order of the so-called retrenchment and, in any event the opposite party Government is not likely to be adversely affected by the matter being taken up even after some delay."

The court rejected the submission in para 6 of the judgment This is what is stated therein:

"In fact the test is one of due diligence. The forty-five days or any other precise test cannot be prescribed but each case would depend upon its circumstances and in general the applicant should account for every day of avoidable delay after the order he seeks to impugn. It is conceivable that an application even within 45 days would be one showing want of diligence while another filed much longer afterwards may still be found to be sufficiently diligent. Everything would depend upon the circumstances but the extreme cases cue as the ones referred to in Bhagwandas Vs. Senior Superintendent, Way and Works, Eastern Rly., and Surrendra Nath Vs. The Chief Conservator of Forests, Punjab, Simla and Another, would be patently wanting in diligence and liable to dismissal on that score alone."

On the facts of that case, the Court came to the conclusion that the petitioner did not approach the court with due diligence and hence the petition was rejected. This decision really supports the State.

(18) For the reasons mentioned above, we are unable to accept the contention of Mr. Iyengar that whenever a person complains of an infringement of fundamental right, no question of delay arises for consideration. On the facts of this case, we have no doubt in concluding that the petitioner was guilty of serious laches. She has approached this court after a delay of over 11 years. She has offered no explanation in that regard. evidently, she was sitting on the fence. It was only when she was reverted from the post of Deputy Director of Public Instruction in the year 1962 for want of vacancy, she thought fit to dig into the past and resurrect her forgotten grievances.

(19) For the reasons mentioned above this petition fails and the same is dismissed with costs of the first respondent Advocate's fee Rs.100/-

(20) Petition dismissed.