

(2015) 01 RAJ CK 0204
In the Rajasthan High Court
Case No : Civil Writ Petition No. 4771 of 1997

Shyam Sunder Swami

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 29-01-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 32

Citation : (2015) 01 RAJ CK 0204

Hon'ble Judges : Veerender Singh Siradhana, J

Bench : Single Bench

Advocate : Anand Sharma, for the Appellant

Final Decision : Dismissed

Judgement

Veerender Singh Siradhana, J.—The petitioner has instituted the instant writ petition projecting a challenge to the order dated 20th July, 1996 (Annexure-1), praying for the following relief(s):--

"i) by an appropriate writ, order or directions the impugned order Dt. 20.7.96 (Annex-11) issued by the respondent No. 2 promoting the respondent No. 3 on the post of Sr. Personal Assistant may kindly be declared illegal and the same may kindly be quashed and set aside with all consequential benefits.

ii) by an appropriate writ, order or directions, the fixation of pay of respondent No. 3 in terms of Govt. Circular Dt. 25.1.1992 made vide impugned Order (Annex-9) Dt. 20.1.94 be declared illegal and the same may kindly be quashed and set aside.

iii) by an appropriate writ, order or directions, the promotion of respondent No. 2 on the post of Stenographer Gr.II, Stenographer Grade-I be declared illegal and against the Rules.

iv) by an appropriate writ, order or directions the respondent Nos. 1 and 2 be directed to consider the case of petitioner for the post of Sr. Personal Assistant

by treating him senior to respondent No. 3 and to promote him as such with all consequential benefits.

v) Or any other appropriate relief which this Hon''ble Court may deem fit and proper be passed in favour of petitioner.

vi) Costs of the writ petition be also awarded in favour of petitioner."

2. Briefly, the skeletal material facts necessary for appreciation of the controversy raised herein needs to be first noticed. It is pleaded case of the petitioner that he was initially appointed as Stenographer in Urban Improvement Trust (UIT) on 23rd April, 1973 so also the respondent number 3 (Keshrilal Nagar), was also appointed as Stenographer on 23rd April, 1973. The petitioner claimed himself to be in possession of the Diploma in Stenography and Stenography from ITI. Since the respondent number 3 was initially appointed as Lower Division Clerk (LDC) on ad-hoc/temporary basis on 30th September, 1972, and thereafter, was accorded promotion on ad-hoc basis as Stenographer Grade-II. The same was bad in the eye of law for the post of Stenographer Grade-II, could be filled up by direct recruitment and not by way of promotion. Therefore, the appointment of the respondent number 3, has been assailed as illegal and contrary to the Scheme of the Rules. Referring to order dated 28th January, 1981 (Annexure-4), the petitioner has emphasized that he had better claim for appointment to the post of Stenographer Grade-II, and thereafter, to Grade-I. The petitioner further questioned the promotion of the respondent number 3 as Personal Assistant vide order dated 20th July, 1996 (Annexure-11).

3. In response to the notice of the writ application, the respondents have filed their counter-affidavit raising preliminary objections for the same issue was also pending before the Civil Court, as would be reflected from stay order dated 23rd August, 1982 (Annexure-7), and order passed by the Munsif and Judicial Magistrate-I, Kota City, in Civil Suit Number 113 of 1981, filed by the respondent number 3. However, subsequently in the year 1999, the civil suit has been dismissed in default.

4. The respondent - UIT supporting it's action has pleaded that promotion of the respondent number 3 to the post of Stenographer Grade-II was made way back in the year 1973, and the challenge made in the year 1997 cannot be sustained. The writ application, therefore, suffers with the vice of delay and laches, and hence, deserves to be dismissed on this count alone. It is further stated in the counter affidavit that no benefit of any illegal pay fixation has been extended in favour of the respondent number 3. Further, increments after nine and eighteen years of service are separate issues.

5. The respondent number 3 in his counter affidavit has also pleaded delay and laches as a ground for declining any relief to the petitioner. Further, according to the respondent number 3, he has been shown senior to the petitioner right from 1978 onwards, and this fact has never been disputed and no challenge was ever made by the petitioner. According to the respondent number 3, he was initially

appointed on 28th September, 1972, on the post of LDC against the post of Stenographer Grade-II. Further, he was in possession of the required educational qualifications, and stenography was an optional subject in Bachelor of Commerce (B. Com.). His name was registered with the Employment Exchange and the Employment Exchange, Kota, had also issued a "No Objection Certificate" for the post of Stenographer. The facts, as stated by the petitioner, for the petitioner being in possession of Diploma in Stenography from ITI, have been denied since the qualification was acquired in the year 1975. Referring to the communication/order dated 28th January, 1981, it is further pleaded that neither the petitioner nor the respondent number 3, were held qualified for holding the post of Stenographer Grade-I. Be that as it may, the matter was considered by the UIT, as would be evident from communication dated 9th August, 1991, wherein after an enquiry, it was suggested that the dispute between the petitioner and the respondent number 3, may be decided as per the provisions of the Rajasthan Subordinate Office Ministerial Staff Rules, 1957. Later on, the respondent number 3, was also promoted to the post of Senior Personal Assistant as he was senior to the petitioner, on the recommendations made by the Departmental Promotion Committee, as would be evident from the order dated 20th July, 1996.

6. The learned counsel for the petitioner, reiterating the pleaded facts and grounds of the writ application, has strenuously argued that the very appointment of the respondent number 3 by way of promotion on 23rd April, 1973, to the post of Stenographer Grade-II, was illegal. According to the learned counsel, the matter was agitated by the petitioner, as would be evident from the communication dated 28th January, 1981, wherein the claim of the petitioner was considered better as compared to that of the respondent number 3, and the UIT was advised to conduct a suitable test and only then consider the respondent number 3 for promotion. If there was any post of Stenographer Grade-I, vacant in the UIT, the petitioner may be considered for appointment to the post of Stenographer Grade-I. Since the impugned order dated 20th January, 1994 (Annexure-11), according further promotion to the respondent number 3, on the post of Senior Personal Assistant, is under challenge in the writ proceedings instituted on 14th August, 1997, and thus, there is no delay.

7. Per contra; the learned counsel for the respondent - UIT supporting it's action has argued that the writ petition is not maintainable in view of the preliminary objections for parallel proceedings could not have been maintained on the same subject matter. However, the civil suit instituted by the respondent number 3 was dismissed in default in the year 1999. The learned counsel would further submit that the matter was thoroughly examined by the UIT, as would be reflected from the communication dated 9th August, 1991, addressed to the Deputy Secretary, UDH, wherein it was requested to cancel the communication/order dated 28th January, 1991.

8. Mr. Ajat Shatru Mina, learned counsel appearing on behalf of the respondent number 3, referring to the order/communication dated 28th January, 1991,

submitted that both the petitioner as well as the respondent number 3, were considered not qualified to hold the post of Stenographer Grade-I as they did not pass the test from the Rajasthan Public Service Commission. Further, since the respondent number 3, was appointed as Stenographer Grade-II on 23rd April, 1973.

9. Even if there was any irregularity in the appointment, the same was not open for challenge by the petitioner by way of institution of the writ proceedings in the year 1997, and the writ application merits rejection only on the ground of delay and laches. Learned counsel in order to reinforce his submissions has placed reliance on the opinions of the Hon"ble Supreme Court in the case of Ghulam Rasool Lone Vs. State of Jammu & Kashmir and Another, (2009) 122 FLR 983 : (2009) 13 JT 422 : (2009) 15 SCC 321 : (2010) 1 SCC(L&S) 539 : (2009) 10 SCR 591 : (2009) 3 SLJ 211 : (2009) 5 SLR 449 : (2009) 8 UJ 3740 ; P.S. Sadasivaswamy Vs. State of Tamil Nadu, AIR 1974 SC 2271 : (1974) 29 FLR 433 : (1974) LabIC 1431 : (1975) 1 SCC 152 : (1975) 2 SCR 356 : (1974) 6 UJ 654 ; State of Uttaranchal and Another Vs. Sri Shiv Charan Singh Bhandari and Others, (2013) 139 FLR 760 : (2014) LabIC 1494 : (2013) 5 LLN 413 : (2013) 11 SCALE 56 : (2013) 12 SCC 179 : (2014) 1 SCT 303 : (2014) 1 SLJ 33 ; C. Jacob Vs. Director of Geology and Mining Indus. Est. and Another, AIR 2009 SC 264 : (2008) 11 JT 280 : (2009) 2 LLJ 1 : (2008) 13 SCALE 434 : (2008) 10 SCC 115 : (2008) 2 SCC(L&S) 961 : (2009) 2 SLJ 223 : (2009) 1 SLR 638 , and Karnataka Power Corporation Limited through its Chairman and Managing Director and Another Vs. K. Thangappan and Another, AIR 2006 SC 1581 : (2006) 109 FLR 724 : (2006) 4 JT 312 : (2006) 2 LLJ 421 : (2006) 4 SCALE 56 : (2006) 4 SCC 322 : (2006) SCC(L&S) 791 : (2006) 3 SLJ 201 : (2006) AIRSCW 3259 : (2006) AIRSCW 1828 : (2006) 5 Supreme 309 : (2006) 3 Supreme 370 .

10. The learned counsel urged that both the petitioner as well as the respondent number 3, have retired attaining the age of superannuation in January and October, 2010 respectively from the post of Personal Assistant and Senior Personal Assistant in the same pay scale, and as such, the writ application has become infructuous.

11. I have heard the learned counsel for the parties, and with their assistance, perused the materials available on record.

12. The learned counsel for the petitioner was called upon to refer to the documents on the strength of which he claimed himself to be in possession of the Diploma of Stenography from ITI. No document could be produced specifically pointing out to substantiate the fact pleaded.

13. The learned counsel made a reference to the order dated 9th October, 1993, passed on an application for temporary injunction in the Civil Suit instituted by the respondent number 3, wherein a photostat copy of the document with reference to the eligibility of the petitioner was filed before the trial Court. From the reply submitted on behalf of the respondent number 3, it is reflected that the

petitioner acquired the Diploma in Stenography from ITI in the year 1975.

14. Further, the matter was considered on the representation made by the petitioner. Both the petitioner as well as the respondent number 3, were held to be not qualified for appointment staked for the post, as would be reflected from the communication/order dated 28th January, 1981.

15. From the pleaded facts and materials available on record, it is apparent on the face of record that the petitioner was very much aware about the alleged illegality, if any, in the appointment of the respondent number 3, since 1973 and he had been representing the case to the State-respondents. The petitioner never instituted any proceedings before any court of law alleging any illegality in the appointment of the respondent number 3, on the post of Stenographer Grade-II.

16. From the communication dated 9th August, 1991, it is further reflected that after examination of the relevant record including service record of the petitioner, the informations furnished by the petitioner, were found to be incorrect.

17. Neither the petitioner nor the respondents could not specifically point out the document on record, to substantiate the fact that Diploma in Stenography from ITI, was acquired by the petitioner. The learned counsel for the petitioner submitted that such a qualification was not a requirement under the Rules.

18. Having perused the communication dated 9th August, 1991, it is found that the fact of qualification, as stated by the petitioner, acquired by him from ITI, is a disputed question of fact, which cannot be adjudicated upon in exercise of writ jurisdiction under Article 226 of the Constitution.

19. Be that as it may, the issue of illegality in the appointment of the respondent number 3, with reference to the order dated 23rd April, 1973, is not open for assailment by way of writ proceedings by the petitioner since the writ proceedings were instituted in the year 1997, after a long, unexplained and inordinate delay while the petitioner was very much aware of the alleged illegality.

20. In case of Ghulam Rasool Lone (supra), the Hon"ble Supreme Court while considering the question of delay and laches in availing of the remedy under Article 226 of the Constitution, observed thus:--

"17. It is beyond any cavil of doubt that the remedy under Article 226 of the Constitution of India is a discretionary one. For sufficient or cogent reasons a court may in a given case refuse to exercise its jurisdiction; delay and laches being one of them.

18. While considering the question of delay and laches on the part of the petitioner, the court must also consider the effect thereof. Promotion of Hamidullah Dar was effected in the year 1987. Abdul Rashid Rather filed his writ petition immediately after the promotion was granted. He, therefore, was not guilty of any delay in ventilating his grievances. It will bear repetition to state

that the petitioner waited till Abdul Rashid Rather was in fact promoted. He did not consider it necessary either to join him or to file a separate writ petition immediately thereafter, although even according to him, Abdul Rashid Rather was junior to him.

The Division Bench, therefore, in our opinion rightly opined that the petitioner was sitting on the fence.

19. If at this late juncture the petitioner is directed to be promoted to the post of Sub-Inspector even above Abdul Rashid Rather, the seniority of those who had been promoted in the meantime or have been directly recruited would be affected. The State would also have to pay the back wages to him which would be a drainage of public funds. Whereas an employee cannot be denied his promotion in terms of the Rules, the same cannot be granted out of the way as a result whereof the rights of third parties are affected. The aspect of public interest as also the general administration must, therefore, be kept in mind while granting equitable relief."

21. In the case of P.S. Sadasivasway (supra), wherein the remedy was availed of after a delay of 14 years, the Hon'ble Supreme Court, observed thus:--

"2. The main grievance of the appellant is that the 2nd respondent who was junior to him as Assistant Engineer was promoted as Divisional Engineer in 1957 by relaxing the relevant rules regarding the length of service necessary for promotion as Divisional Engineer and that his claim for a similar relaxation was not considered at that time. The learned Judge of the Madras High Court who heard the writ petition was of the view that the relaxation of the rules in favour of the 2nd respondent without considering the appellant's case was arbitrary. In view of the statement on behalf of the Government that such relaxation was given only in the case of overseas scholars, which statement was not controverted, it is not possible to agree with the view of the learned Judge. Be that as it may, if the appellant was aggrieved by it he should have approached the Court even in the year 1957 after the two representations made by him had failed to produce any result. One cannot sleep over the matter and come to the Court questioning that relaxation in the year 1971. There is the further fact that even after respondents 3 and 4 were promoted as Divisional Engineers over the head of the appellant he did not come to the Court questioning it. There was a third opportunity for him to have come to the Court when respondents 2 to 4 were again promoted as Superintending Engineers over the head of the appellant. After fourteen long years because of the tempting prospect of the Chief Engineership he has come to the Court. In effect he wants to unscramble a scrambled egg. It is very difficult for the Government to consider whether any relaxation of the rules should have been made in favour of the appellant in the year] 957. The conditions that were prevalent in 1957 cannot be reproduced now. In any case as the Government had decided as a matter of policy, as they were entitled to do, not to relax the rules in favour of any except overseas scholars it will be wholly pointless to direct them to consider the appellants' case

as if nothing had happened after 1957. Not only respondent 2 but also respondents 3 and 4 who were the appellant's juniors became Divisional Engineers in 1957 apparently on the ground that their merits deserved their promotion over the head of the appellant. He did not question it. Nor did he question the promotion of his juniors as Superintending Engineers over his head. He could have come to the Court on every one of these three occasions. A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extra-ordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters. The petitioner's petition should, therefore, have been dismissed in limine. Entertaining such petitions is a waste of time of the Court. It dogs the work of the Court and impedes the work of the Court in considering legitimate grievances as also its normal work. We consider that the High Court was right in dismissing the appellant's petition as well as the appeal."

22. In the case of Karnataka Power Corporation Limited (supra), the Hon'ble Supreme Court, observed that exercising of discretionary power under Article 226 of the Constitution may be declined in appropriate case of negligence or omission on the part of the applicant to assert his right after a lapse of time and other circumstances that may cause prejudice to opposite party. The Hon'ble Supreme Court referring to the earlier precedents, observed thus:--

"6. Delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the Constitution. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Even where fundamental right is involved the matter is still within the discretion of the Court as pointed out in Durga Prasad Vs. Chief Controller of Imports and Exports, AIR 1970 SC 769 : (1969) 1 SCC 185 : (1969) 2 SCR 861 . Of course, the discretion has to be exercised judicially and reasonably. 7. What was stated in this regard by Sir Barnes Peacock in Lindsay Petroleum Company v. Prosper Armstrong Hurd etc. 1874 (5) P.C. 221 was approved by this Court in The Moon Mills, Ltd. Vs. M.R. Meher, President, Industrial Court, Bombay and Others, AIR 1967 SC 1450 and Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor Service, Amravati and Others, AIR 1969 SC 329 : (1969) 1 SCR 808 . Sir Barnes had stated:

Now, the doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitation, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

8. It would be appropriate to note certain decisions of this Court in which this aspect has been dealt with in relation with Article 32 of the Constitution. It is apparent that what has been stated as regards that Article would apply, a fortiori, to Article 226. It was observed in *Rabindranath Bose and Others Vs. The Union of India (UOI) and Others*, AIR 1970 SC 470 : (1970) LabIC 402 : (1970) 1 SCC 84 : (1970) 2 SCR 697 that no relief can be given to the petitioner who without any reasonable explanation approaches this Court under Article 32 after inordinate delay. It was stated that though Article 32 is itself a guaranteed right, it does not follow from this that it was the intention of the Constitution makers that this Court should disregard all principles and grant relief in petitions filed after inordinate delay.

9. It was stated in *State of M.P. and Others Vs. Nandlal Jaiswal and Others*, AIR 1987 SC 251 : (1986) 2 SCALE 638 : (1986) 4 SCC 566 : (1987) 1 SCR 1 that the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in exercise of its writ jurisdiction. It was stated that this rule is premised on a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring, in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.

10. It has been pointed out by this Court in a number of cases that representations would not be adequate explanation to take care of delay. This was first stated in *K.V. Raja Lakshmiah v. State of Mysore* AIR 1967 SC 973. This

was reiterated in R.N. Bose's case (supra) by stating that there is a limit to the time which can be considered reasonable for making representations and if the Government had turned down one representation the making of another representation on similar lines will not explain the delay. In State of Orissa v. P. Samantaraj AIR 1976 SC 1617 making of repeated representations was not regarded as satisfactory explanation of the delay. In that case the petition had been dismissed for delay alone. (See State of Orissa and Others Vs. Shri Arun Kumar Patnaik and Others, AIR 1976 SC 1639 : (1976) LabIC 1122 : (1976) 3 SCC 579 : (1976) SCR 59 Supp : (1976) 8 UJ 508 also)."

23. For the reasons and discussions herein above as well as in view of the law declared by the Hon"ble Supreme Court, the writ petition is devoid of any substance, and lacks in merit, and therefore, deserves to be dismissed.

24. Ordered accordingly.

25. In view of the final adjudication on the writ application, the stay application stands closed.

26. However, in the facts and circumstances of the case, there shall be no order as to costs.