
(2013) 11 GAU CK 0004
In the Gauhati High Court
Case No : W.P. (C) No. 3746 of 2008

Union of India and Another

APPELLANT

Vs

Nilutpal Patar

RESPONDENT

Date of Decision : 09-11-2013

Acts Referred:

Citation : (2014) 1 GLT 711

Hon'ble Judges : Tinlianhang Vaiphei, J; Anima Hazarika, J

Bench : Division Bench

Judgement

Tinlianhang Vaiphei, J.—In this writ petition, the railway authorities are questioning the legality of the order dated 17.1.2008 passed by the Central Administrative Tribunal, Guwahati ("CAT" for short) in Misc. Petition No. 119 of 2007 arising out of Review Application No. 4 of 2007, which, in turn, was directed against the order dated 3.7.2007 passed by the CAT in Original Application No. 114 of 2006. The case of the petitioners is that in the year 2004, the railway authorities issued the advertisement dated 12.6.2004 inviting applications from eligible candidates for appointment to the posts of Electrical Signal Maintenance Grade-III by indicating therein that four posts were reserved for Scheduled Tribes candidates. The respondent applied for the post and took part in the recruitment examination held on 27.5.2005 as ST candidate, and was declared successful in the written test whereafter he was asked to get his testimonials verified by the Railway Recruitment Board (RBO), which was duly done by him. Subsequently, he came to know that his name was not included in the select list on age consideration. He, therefore, filed his representation dated 28.11.2005 to the General Manager, N.F. Railway, but the same was not attended to whereupon he filed Original Application No. 320 of 2005 before the Central Administrative Tribunal, Guwahati ("CAT" for short). The CAT by the order dated 23.12.2005 disposed of the Original Application by directing the railway authorities to dispose of his representation dated 28.11.2005 by giving him liberty to file additional representation, if so advised. Additional representation was filed by the respondent to the railway authorities on 28.11.2005 by making a

new contention that relative age cannot be a ground for denial in the matter of appointment. The RBO by the order dated 22.2.2006 rejected the contention of the respondent. Aggrieved by this, the respondent filed OA No. 114 of 2006 before the CAT, Guwahati, which by the order dated 3.7.2007 allowed the application by directing the petitioners to determine the eligibility of the respondent vis-à-vis the other two candidates (who secured equal marks in the written examination dated 27.3.2005 on the basis of the marks secured by them in HSLC/HSSLC examination. After considering the decision of the Tribunal at the various levels of the railways authorities, it was decided to file a review petition. As there was delay of 90 days in filing the review application, Misc. Petition No. 119/07 for condonation of delay. The Misc. Case was, however, dismissed on 17.1.2008 by the Tribunal by holding that no sufficient case was made out by the petitioners to condone the delay in filing the Review Application No. 4 of 2007.

2. Aggrieved by the order dated 17.1.2008, the petitioners are now filing this writ petition. According to the petitioners, the Review Application was filed within the extended period granted by the CAT by its order dated 13.9.07 along with an application for condonation of delay and, that too, only as an abundant caution. The Tribunal, however, dismissed the application for condonation by holding that no sufficient cause had been made out by the petitioners to condone the delay. The petitioners contend that the dismissal of their application for condonation by overlooking the merit of the case of the applicants has resulted in perpetuation of illegality and gravely prejudiced their case. It is submitted that there was sufficient cause for condoning the delay, and the CAT has improperly exercised its discretion in dismissing the application for condoning the delay by completely overlooking the merit of the case.

3. Both Mr. D.K. Dey, the learned Standing Counsel for the petitioners, and Mr. M.K. Choudhury, the learned senior counsel appearing for the respondent, were heard. The first contention of the learned senior counsel for the private respondent is that the review application was merely a subterfuge adopted by the railway authorities to deprive the private respondent of the fruit of litigation obtained by him from the Tribunal: the challenge to the legality of the judgment dated 3.7.2007 passed by the CAT is on flimsy grounds. According to him, the order under challenge here is bearing dated 17.1.2008 passed by the CAT refusing to condone the delay in filing the review application i.e. Review Application No. 4 of 2007, which arose out of Original Application No. 114 of 2006. His contention is that while the order sought to be reviewed had been passed on 3.7.2007, an application was filed by the petitioners for granting them four months' time to comply with the directions contained therein, but instead of complying with the said directions, they chose to file the review application along with an application for condonation of delay, which amounts to playing fraud upon the Hon'ble CAT. According to the learned senior counsel, not only the reprehensible conduct of the petitioners in representing that such extension was necessary to comply with the order of Tribunal whereas that representation had turned out to be completely misleading but also the utter absence of convincing

explanation for the delay in filing the review petition, warrant dismissal of the appeal.

4. On reading the order dated 17.1.2008 and the relief claimed in this writ petition, as reproduced earlier, in juxtaposition, we find that the first question which falls for consideration in this writ petition is whether the Tribunal has properly exercised its discretion in not condoning the delay. This then takes us to the relevant portions of the order of the Tribunal in dismissing the prayer for condonation of delay, which read thus:

From the above dates of events it is evident that there has been delay of about 3 months in filing the R.A. which has been filed on 15.11.2007. From the order of this Tribunal dated 13.9.2007 in M.P. No. 90/2007 (enclosed by the petitioners as Annexure-B), it is clear that the petitioners (respondents in O.A.) filed the said M.P. seeking for extension of time for the purpose of implementing the order dated 3.7.2007 of the Tribunal in the O.A. (supra). The said order is reproduced herein below:

Counsel for the applicant submitted that they have decided to implement the order of the Tribunal. Since the matter has been sent to the Railway Ministry it may take some more time and prays for extension four months time. Considering the submissions and pleadings four months further time is granted for compliance of the order as a last chance. No further time will be granted.

Misc. Petition is allowed and disposed of.

That being the position, the petitioners herein cannot now count the said period for the purpose of explaining their delay in filing the R.A. Moreover, the order of the Tribunal was passed in the said M.P. on 13.9.2007. The petitioners took another 2 months to file the R.A.

3. We are, therefore, of the view that no sufficient cause has been made out by the petitioners herein to condone the delay in filing the R.A. The M.P. is accordingly dismissed.

4. Consequently, R.A. No. 4/2007 in O.A, No. 114/2006 filed by the petitioners is also dismissed.

5. There will be no order as to costs.

5. In our opinion, the principles laid down by the Apex Court for condoning delay/laches are also applicable to the CAT while examining the question of condoning delay. In this context, the observations of the Apex Court in paragraph 13 of the judgment in Royal Orchid Hotels Limited and Another Vs. G. Jayarama Reddy and Others, are instructive. This is what it said:

13. The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what branch of the fundamental right and the remedy claimed are

and how delay arose. The principle on which the relief to the party on the ground of laches or delay is denied is that the right which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is reasonable explanation for the delay. The real to determine delay in such cases is that the petitioner must come to the writ Court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. The test is not as to physical running of time. Where the circumstances justifying the conduct exist; the illegality which is manifest cannot be sustained on the sole ground of laches. The decision in Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, relied on is distinguishable on the facts of the present case. The levy if based on the net profits of the railway undertaking was beyond the authority and the illegal nature of the same has been questioned though belatedly in the pending proceedings after the pronouncement of the High Court in the matter relating to the subsequent years. That being the case, the claim of the appellant cannot be turned down on the sole ground of delay." We are of the opinion that the High Court was wrong in dismissing the writ petition in limine and refusing to grant the relief sought for.

6. Though the observations extracted above were made in the context of laches in a writ petition filed by a private individual claiming fundamental right, the underlying principles, in our opinion, can also be held applicable for considering the question of delay/laches in filing a review application before the Tribunal. What is worthy of note is that the Tribunal should not have allowed its illegal order to perpetuate merely on the ground of delay: to do otherwise will result in grave miscarriage of justice. No hard and fast rule can be laid down as to when the Tribunal should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. That is a matter which must be left to the discretion of the Tribunal and like all matters left to the discretion of the Court, in this matter too, such discretion must be exercised judiciously and reasonably. For example, the possibility of the officials of the petitioners and the private respondents acting in collusion to deliberately delay the filing of the review petition in time as to enable the private respondent to enjoy the benefit obtained by him contrary to law.

7. In the instant case, in the course of hearing, we have also allowed the parties to argue also on merit of the case. The order sought to be reviewed is clearly contrary to the provisions of Clause 304 of the Rules Regulating Seniority of Non-Gazetted Railway Servants, which reads thus:

304. When two or more candidates are declared to be of equal merit at one and the same examination/selection, their relative seniority is to be determined by the date of birth, the older candidate being the senior.

The RBO by the order dated 22.2.2006 rejected contention of the respondent by pointing out that there were three ST candidates securing equal marks in the written tests and, having regard to the fact that the relative age of the three candidates were to be taken to be the determining factor in terms of the above

rule, the respondent, being the youngest amongst the three candidates, was not selected. The view taken by the RBO is consistent with and conforms to the requirement of Clause 304 and is not liable to be interfered with. In our judgment, the Tribunal has misread/overlooked Clause 304 of the Rules and has, therefore, grossly erred in holding that this clause is irrelevant and directed the petitioners to determine the eligibility of the respondent vis-à-vis the other two candidates on the basis of the marks secured by them in HSLC/HSSLC Examination. Clause 303 also speaks of the principles for seniority of candidates recruited through the Railway Recruitment Board thereby making it clear that this clause is also all about direct recruitment. Similarly, the subsequent clauses, namely, Clauses 304, 305, 306, 307 and 308 also refer to seniority with respect to direct recruits. Clause 309 is specifically engrafted for the purpose of determining seniority on promotion. In other words, determination of seniority for non-gazetted railways servants such as the post for Electrical Signal Maintenance Grade-III, who are appointed by direct recruitment, is to be regulated by Clause-304 i.e. by date of birth, the older candidate being the senior in case two or more candidates are declared to be of equal merit at one and the same examination/selection.

8. The Tribunal has acted contrary to law in holding that the marks secured by the candidates in the prescribed examination should be the deciding factor for determination their relative seniority, which is inconsistent with and is not permissible under Clause 304. Under the circumstances, the prayer for condoning the delay ought to have been allowed and the review petition heard on merit. This is certainly a case where substantial justice and technical considerations are pitted against each other and, as such, the cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done even in the absence of satisfactory explanation by the petitioners. Normally, this Court should have remanded the case for fresh hearing on merit by the Tribunal, but considering the number of years gone by, such course of action- will not be advisable at this belated stage. Moreover, we have already heard both the counsel on merit and have no hesitation in holding that the impugned judgment dated 3.7.2007 passed by the Tribunal in Original Application No. 114 of 2006, for the reasons already noted earlier, is contrary to law and is, therefore, unsustainable in law. We further hold that this is not a case where the rule of practice that the Court may not enquire into belated and stale claim, cannot be held applicable: such decision will result in perpetuation of illegality and grave miscarriage of justice. The Tribunal has failed to appreciate the glaring fact that the order sought to be reviewed is contrary to law and has in the process grossly erred in law in not condoning the delay and in not hearing the case on merit. In the light of our findings set forth above, we allow this writ petition. The impugned order dated 17.1.2008 passed by the Tribunal dismissing the application for condoning delay is, therefore, set aside. Furthermore, as we do not find merit in the original application, we also, set aside the order dated 3.7.2006 passed by the Tribunal in Original Application

No. 114 of 2006. The parties are, however, directed to bear their respective costs.