

(2012) 01 PAT CK 0051
In the Patna High Court
Case No : CWJC No. 10443 of 2011

Upendra Prasad Sharma and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 30-01-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2012) 2 PLJR 268

Hon'ble Judges : Navin Sinha, J

Bench : Single Bench

Advocate : Chitranjan Sinha and Manish Kumar, for the Appellant; Ajay . for the State: Mr. Shailesh Kumar Sharma . for the Respondent No. 6, for the Respondent

Final Decision : Allowed

Judgement

Navin Sinha

1. Heard learned Counsel for the petitioners, the State, private respondent No. 6. No one appears on behalf of private respondent No. 7 despite valid service. The petitioners are promotees from the post of Junior Engineer to that of Assistant Engineers. Respondent No. 6 is a direct appointee as Assistant Engineer. The controversy is with regard to the seniority on the post of Assistant Engineer, the feeder post for Executive Engineer. The petitioners are aggrieved by the order dated 6.6.2011 of the Principal Secretary, Water Resources Department, holding that respondents 6 and 7 as direct recruits were senior to the petitioners.

2. It is submitted that a provisional gradation list of Assistant Engineers was prepared in 1992. The petitioners were shown junior to the private respondents. Objections were filed by the petitioners. In the final gradation list published on 14.2.2001 the petitioners were placed above the direct recruits. The private respondents did not challenge the final gradation list. On 9.4.2007 a gradation list, was published at the time of reorganization of the State of Bihar. The petitioners were again shown senior to respondents 6 and 7. On 3.1.2008 a

gradation list was again published in which the petitioners were likewise shown as senior to the direct recruits. On 29.12.2010 in accordance with their seniority position in the gradation list the petitioners were promoted to the next promotional post of Executive Engineer. At this stage the private respondents had approached this Court in CWJC No. 15224 of 2010 (Beer Chand Thakur & Another vs. The State of Bihar) with the grievance that they have wrongly been shown as junior in the gradation list of Assistant Engineer. Their representation was pending. They may be permitted to file an exhaustive representation which was disposed on 12.1.2011 with directions for consideration as also hearing those likely to be affected.

3. The private respondents filed their representation on 21.1.2011. It did not make a full and complete disclosure of facts. The petitioners were noticed, filed their objections in detail but the impugned order came to be passed now questioned by them.

4. It is submitted that the issue of inter se seniority attained finality in the gradation list of 2001. Respondent Nos. 6 and 7 did not protest when they lost their position in the provisional list. They did not protest in 2007 or 2008. The first grievance came belatedly in 2010 when the petitioners were being considered for promotion to the post of Executive Engineer. It does not appear from the order in the case of Beer Chand Thakur (supra) that full facts of past events were placed before the Court. Reliance is placed on C. Jacob Vs. Director of Geology and Mining Indus. Est. and Another, and Union of India (UOI) and Others Vs. M.K. Sarkar, to contend that the order in Beer Chand Thakur (supra) does not tantamount to condoning the delay on part of the petitioners in raising their claims.

5. Counsel for the State submitted that the respondent authorities have acted in pursuance of the orders of the Court in the case of Beer Chand Thakur (supra). The petitioners have been given full opportunity and there is no infirmity in the decision making process to warrant any interference in judicial review under Article 226 of the Constitution of India. Counter affidavit has been filed.

6. Counsel for the private respondent No. 6 submits that he was not aware of the appointment letter of the petitioners. He was not heard at the time of finalization of the gradation list in 2001. Objections had been filed in 2007 but it was not considered. No date of the filing of such representation has been mentioned in the representation filed on 21.1.2011. The cause of action arose when the petitioners were being considered for promotion as Executive Engineers. There is no delay on his part in raising the claim. No third party rights had accrued to the petitioners on the date that the Court directed consideration of their representation. A copy of the writ application was served on 18.1.2012 and therefore counter affidavit could not be filed. Adjournment may be granted to file reply on merits.

7. Reliance has been placed on Union of India (UOI) and Others Vs. Har Dayal, at

para 13, to urge that the order in the case of Beer Chand Thakur (supra) was a discretionary order. The delay if any on part of the respondent No. 6 in raising the issue of seniority was condoned by the Court. The impugned order warrants no interference as it was passed in pursuance of a direction of the Court. Reliance was further placed on Shankara Co-op Housing Society Ltd. Vs. M. Prabhakar and Others, at paras 69 to 76, 89 and 136(ii) & (iii) urging that the order in the case of Beer Chand Thakur (supra) not having been questioned by the petitioners has attained finality inter parties and the Court may not go behind the same now.

8. Notice was issued to the private respondents on 11.7.2011 fixing the date of hearing as 7.9.2011. Notice was served on the respondents on 27.8.2011. The case has been running in the cause list and they have had sufficient time to file counter affidavit. The Court on the previous date had observed that it would hear the parties first on the issue of delay and if satisfied grant adjournment to respondent No. 6 to file counter affidavit.

9. The Court is satisfied that the claims of respondent No. 6 are barred by gross delay and laches. They have had more than one opportunity to challenge the gradation list of Assistant Engineers. The explanation furnished by them merits no consideration.

10. Delay has always been considered vital for refusing relief in exercise of discretionary powers under Article 226 of the Constitution of India. While there can be no standard yardstick for holding the relief should be denied on grounds of delay, the exercise of discretion has to be dependant on the facts and circumstances of each individual case. An important ingredient for denying relief on the ground of delay is the creation of appropriate third party rights occasioned due to the lack of diligence and any challenge by those who may have been affected but did not take any steps.

11. A reference to the passage in State of M.P. and Others Vs. Nandlal Jaiswal and Others, may appropriately be made holding as follows:

24. Now, it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in the 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 in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay is premised upon a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices. The rights of third parties may intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third

parties. When the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the meanwhile is an important factor which always weighs with the High Court in deciding whether or not to exercise such jurisdiction.

12. Delay has always been considered vital in service matters especially where it affects third party right and interest. What may be relevant for determining delay under other situations shall not necessarily apply on any uniform principles to service matters. A person in Government service aspires for career advancement through promotion which brings him rank, status and financial emoluments. He endeavors to give his best to the system for recognition of his worth and the consequent promotion that follows. A person with a low morale, not considered for promotion or denied promotion, far worse, deprived the benefits of promotion after having been granted promotion, can hardly be expected to give his best in service. He shall only be a burden on the system at the cost of the public exchequer. Grievances in seniority matters should be raised promptly. Events march on, others get seniority. Any belated interference affects accrued rights by virtue of settled seniority and interference by the Court at a belated stage will only generate further litigation. Both, those desiring promotion and those contesting to save promotion will then spend working time in the portals of the Court than in the department discharging their duty. The ultimate sufferer would be the work of the Government and the public in general.

13. As far as P.S. Sadasivaswamy Vs. State of Tamil Nadu, the Supreme Court had observed that in seniority matters six months period was sufficient to raise challenge. Caution was advised in exercise of power under Article 226 of the Constitution holding as follows:

2. The main grievance of the appellant is that the second 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 second 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 1957. 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 appellant's 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 extraordinary 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 clogs 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.

14. The observation in *K.R. Mudgal and Others Vs. R.P. Singh and Others*, are apposite:

7. The respondents in the writ petition raised a preliminary objection to the writ petition stating that the writ petition was liable to be dismissed on the ground of laches. Although the learned Single Judge and the Division Bench have not disposed of the above writ petition on the ground of delay, we feel that in the circumstances of this case the writ petition should have been rejected on the ground of delay alone. The first draft seniority list of the Assistants was issued in the year 1958 and it was duly circulated amongst all the concerned officials. In that list the writ petitioners had been shown below the respondents. No objections were received from the petitioners against the seniority list. Subsequently, the seniority lists were again issued in 1961 and 1965 but again no objections were raised by the writ petitioners, to the seniority list of 1961, but only Petitioner 6 in the writ petition represented against the seniority list of

1965. We have already mentioned that the 1968 seniority list in which the writ petitioners had been shown above the respondents had been issued on a misunderstanding of the Office Memorandum of 1959 on the assumption that the 1949 Office Memorandum was not applicable to them. The June 1975 seniority list was prepared having regard to the decision in Ravi Varma case and the decision of the High Court of Andhra Pradesh in the writ petitions filed by Respondents 7 and 36 and thus the mistake that had crept into the 1968 list was rectified. Thus the list was finalised in January 1976. The petitioners who filed the writ petition should have in the ordinary course questioned the principle on the basis of which the seniority lists were being issued from time to time from the year 1958 and the promotions which were being made on the basis of the said lists within a reasonable time. For the first time they filed the writ petition in the High Court in the year 1976 nearly 18 years after the first draft seniority list was published in the year 1958. Satisfactory service conditions postulate that there should be no sense of uncertainty amongst the Government servants created by the writ petitions filed after several years as in this case. It is essential that anyone who feels aggrieved by the seniority assigned to him should approach the court as early as possible as otherwise in addition to the creation of a sense of insecurity in the minds of the Government servants there would also be administrative complications and difficulties. Unfortunately in this case even after nearly 32 years the dispute regarding the appointment of some of the respondents to the writ petition is still lingering in this Court. In these circumstances we consider that the High Court was wrong in rejecting the preliminary objection raised on behalf of the respondents to the writ petition on the ground of laches. The facts of this case are more or less similar to the facts in *R.S. Makashi vs. I.M. Menon*. In the said decision this Court observed at p. 100 of the Reports thus:

In these circumstances, we consider that the High Court was wrong in overruling the preliminary objection raised by the respondents before it, that the writ petition should be dismissed on the preliminary ground of delay and laches, inasmuch as it seeks to disrupt the vested rights regarding the seniority, rank and promotions which had accrued to a large number of respondents during the period of eight years that had intervened between the passing of the impugned resolution and the institution of the writ petition. We would accordingly hold that the challenge raised by the petitioners against the seniority principles laid down in the Government Resolution of March 22, 1968 ought to have been rejected by the High Court on the ground of delay and laches and the writ petition insofar as it related to the prayer for quashing the said Government Resolution should have been dismissed.

15. Respondent No. 6 as a direct recruit was shown senior to the petitioners in 1992. The petitioners filed their objections and were placed above respondent No. 6 on 14.2.2001. Respondent No. 6 did not challenge the same at any stage. The gradation list of Assistant Engineers was again published on 9.4.2007 during reorganization of the State showing the petitioners as senior. It was likewise not

questioned. The gradation list of Assistant Engineers published on 3.1.2008 showed the petitioners senior to respondent No. 6. It is difficult to appreciate how the respondent No. 6 can contend that the occasion for him to pursue matters came when the petitioners were being considered for promotion as Executive Engineer in 2010. The feeder post was of Assistant Engineer. Consideration would be on that basis was well known to the respondent No. 6.

16. The sanctity attached to a seniority list was noticed in (2011)7 SCC 743 (Rajendra Pratap Singh Yadav vs. State of Uttar Pradesh) holding:

45. We deem it appropriate to reiterate that in service jurisprudence there is immense sanctity of a final seniority list. The seniority list once published cannot be disturbed at the behest of a person who chose not to challenge it for four years. The sanctity of the seniority list must be maintained unless there are very compelling reasons to do so in order to do substantial justice. This is imperative to avoid avoidable litigation and unrest and chaos in the services."

17. The order of the Court in the case of Beer Chand Thakur (supra.) does not reflect that the petitioners were noticed and heard. The tenor of the order adequately reflects that respondent No. 6 obtained an innocuous order for consideration of the representation. The issues of the gradation list of Assistant Engineer between the parties having attained finality on 14.2.2001, reiterated on 9.4.2007 and 3.1.2008 does not appear to have been brought to the attention of the Court and the aspect of delay in pursuance of the same.

18. In C. Jacob Vs. Director of Geology and Mining Indus. Est. and Another, relied by the petitioner, the Supreme Court in respect of such innocuous orders has observed as follows:

8. Let us take the hypothetical case of an employee who is terminated from service in 1980. He does not challenge the termination. But nearly two decades later, say in the year 2000, he decides to challenge the termination. He is aware that any such challenge would be rejected at the threshold on the ground of delay (if the application is made before tribunal) or on the ground of delay and laches (if a writ petition is filed before a High Court). Therefore, instead of challenging the termination, he gives a representation requesting that he may be taken back to service. Normally, there will be considerable delay in replying to such representations relating to old matters. Taking advantage of this position, the ex-employee files an application/writ petition before the tribunal/High Court seeking a direction to the employer to consider and dispose of his representation. The tribunals/High Courts routinely allow or dispose of such applications/petitions (many a time even without notice to the other side), without examining the matter on merits, with a direction to consider and dispose of the representation.

9. The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly, they assume that a mere direction to consider and dispose of the representation does not involve any "decision" on

rights and obligations of parties. Little do they realise the consequences of such a direction to "consider". If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to "consider". If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored.

11. When a direction is issued by a court/tribunal to consider or deal with the representation, usually the directee (person directed) examines the matter on merits, being under the impression that failure to do so may amount to disobedience. When an order is passed considering and rejecting the claim or representation, in compliance with direction of the court or tribunal, such an order does not revive the stale claim, nor amount to some kind of "acknowledgement of a jural relationship" to give rise to a fresh cause of action.

14. We are constrained to refer to the several facets of the issue only to emphasise the need for circumspection and care in issuing directions for "consideration". If the representation on the face of it is stale, or does not contain particulars to show that it is regarding a live claim, courts should desist from directing "consideration" of such claims.

19. The above view has been followed in *Union of India (UOI) and Others Vs. M.K. Sarkar*, also referred to by the petitioner, holding as follows:

15. When a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches.

16. A court or tribunal, before directing "consideration" of a claim or representation should examine whether the claim or representation is with reference to a "live" issue or whether it is with reference to a "dead" or "stale" issue. If it is with reference to a "dead" or "stale" issue or dispute, the court/tribunal should put an end to the matter and should not direct consideration or reconsideration. If the court or tribunal deciding to direct "consideration" without

itself examining the merits, it should make it clear that such consideration will be without prejudice to any contention relating to limitation or delay and laches. Even if the court does not expressly say so, that would be the legal position and effect.

20. The representation filed by the private respondent on 21.1.2011 mentioned that they were direct recruits to the post of Assistant Engineer. Some Junior Engineers were promoted to the post of Assistant Engineer. No dates have been disclosed. It then refers the provisional gradation list of 1992 but conspicuously makes no reference to the gradation list finally published subsequently on 14.2.2001. Acknowledging that objections had been filed by certain persons to the 1992 provisional seniority list it is stated that they were waiting all this while to be heard. The Court finds the explanation very difficult to accept. The private respondents and the petitioners were both working in the department. The seniority list was finalized on 14.2.2001. No sooner that it must have been published jubilation and disappointment would both have prevailed. It is for the private respondents to explain why they did not express their disappointment by challenge or even later in 2007 or 2008. It is not possible to accept that they remained unaware at all three stages. That the petitioners did not challenge the order in the case of Beer Chand Thakur (*supra*) is not relevant.

21. The case of Hardayal (*supra*) declining to interfere with the discretionary condonation of delay by the High Court while not approving of the same is completely distinguishable on its own facts having no application presently.

22. M. Prabhakar (*supra*) has no application on facts as in Beer Chandra Thakur (*supra*) there was no adjudication of the claims on merits to invoke the doctrine of finality inter parties.

23. The petitioners prudently filed their reply before the Secretary. If they had not participated perhaps their fate in the present proceeding may have been worse attributable to their own. The petitioners took a specific objection in para 2 of their representation that the claims were hopelessly barred by limitation raising a very highly belated grievance right from 1987 to 2008. It was also alleged that full facts had not been placed and that facts had been suppressed. It was also asserted that the notification No. 4415 dated 14.10.1987 specifically fixed the seniority of the petitioners above the direct recruits of the year 1987. The private respondents did not question the same. The Court is satisfied that the petitioners had more than adequately raised the issue of delay in raising the claims.

24. The impugned order in two columns recites respective case of the parties. It then proceeds to conclude that the private respondents were appointed on the recommendation of the Bihar Public Service Commission while the petitioners were promotees. The vacancies were clubbed from 1979 and 1986 and all of them appointed in one transaction. They were actually two separate transactions and cannot be treated as same transaction. The aspect of delay in raising the

claim on part of the petitioners has not been considered at all. Though not relevant for the purpose of the present order it may only be noticed that the impugned order does not contain any discussion with regard to the principles for fixation of seniority between direct recruits and the promotees. The impugned order dated 6.6.2011 is held not sustainable. It is accordingly set aside. The writ application is allowed.