

REPORTABLE

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ WRIT PETITION (CIVIL) NO. 2610 OF 2011

Reserved on : 26th April, 2011.

% Date of Decision : 13th May, 2011.

T.K. BHARDWAJ Petitioner

Through Petitioner in person.

VERSUS

DIRECTOR GENERAL OF AUDIT & OTHERS ...Respondents

**Through Mr. Rahul Kumar & Gaurang Kanth,
Advocates**

CORAM:

HON'BLE MR. JUSTICE DIPAK MISRA, THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes.
3. Whether the judgment should be reported in the Digest ? Yes.

SANJIV KHANNA, J.:

The petitioner, T.K. Bhardwaj impugns order dated 31st August, 2010 dismissing O.A.No.2825/2009 and order dated 6th December, 2010 dismissing R.A.No.303/2010 and M.A.No.2968/2010. The Tribunal has held that the original application filed by the petitioner herein was barred by limitation and the petitioner had failed to file an application for condonation of delay. The review application was dismissed on the ground that the contentions raised were beyond the scope and jurisdiction of power of review. It may be noted here that the Tribunal did not advert to and examine the contentions on merits in the

order dated 31st August, 2010 on the ground that the original application was barred by limitation.

2. The petitioner was appointed as a direct recruit Section Officer on probation by appointment order dated 30th October, 1998 in the Post and Telecommunications Audit Office headed by the Director General of Audit (P&T). The probation period was of two years, which would be increased or decreased at the discretion of the appointing authority. The appointment was purely temporary and was terminable at one month's notice on either side. On satisfactory completion of the probation period, the petitioner as per the terms of the appointment order was eligible to be posted on regular basis as Section Officer (Audit) subject to availability of permanent vacancies.

The relevant provisions of the offer of appointment reads:-

“1. The period of probation will be two years. This may however be increased or decreased at the discretion of the appointing authority. His/her appointment will be purely temporary and will be terminable at one month's notice on either side.

2. During the period of probation he/she will have to undergo a regular course of training for such a period at such place and in such manner as may be prescribed. He/she may also assigned regular duties during the period of training.

3. On conclusion of training referred in Para 2 above she/he will have to qualify in both Part I and II of the Section Officer Grade Examination (SOGEx) to be conducted by IA&AD failing which he/she will be liable to be discharged from service. Candidate who pass this examination will be appointed as regular Section Officer (Audit).”

3. The aforesaid appointment was made under the Indian Audit and Accounts Department, Section Officer (Accounts) and Section Officer (Audit) Recruitment Rules, 1998. The said rules were amended with effect from 30th October, 1998 and a new rule 5.5.2 was incorporated and the relevant rule reads as under:-

Period of Probation	Two years
Method of recruitment, whether by direct recruitment or by promotion or by deputation/transfer and percentage of the vacancies to be filled by various methods	Promotion. Failing which by recruitment or by promotion or by transfer on deputation and deputation/transfer and percentage of the failing both the direct recruitment vacancies to be filled (sic) by various methods. Note : The direct recruits will be selected on the basis of an entrance examination conducted by the Comptroller & Audit (sic) General of India or any authority specified by him. During the period of probation they should qualify in the Section Officer Grade Examination for appointment as regular Section Officers.” Two years

4. In accordance with the Rule, Circular No.10-Audit (O&M)/1998 and Circular No.506-Audit (O&M)/253-94 dated 30th October, 1998 was issued. The relevant portion of the said circular reads as under:-

“Every direct recruit appointed to the cadre of Section officer will be on probation for a period of two years. During the period of probation he/she will have to qualify the SOGE Part II. If a direct recruit/fails to pass both parts of S.O.G.E within the period of probation, he/she will be removed from service or if fully deserving of retention may be offer appointment as Auditor in respective office against a direct recruitment vacancy, if available.”

5. The aforesaid Rule and circular make it clear that the direct recruits to the post of Section Officer had to within the probation period qualify the Section Officers Grade Examination (SOG E) before they are appointed as regular Section Officers. The circular stipulates that if a Section Officer does not qualify the SOGE Part I and II during the probation period, he would be removed from service, but a deserving candidate may be offered appointment as an Auditor in respective office against a direct recruitment vacancy, if available.

6. The petitioner after appointment, appeared in SOGE Part I in November, 1999 and November, 2000, but could not clear the same. The respondent, however, extended the probation period till June, 2002. The petitioner cleared Part I examination in November, 2001 but failed to clear and did not pass Part II examination.

7. By office order No.294 dated 5th September, 2002, the petitioner was removed from service as a Section Officer, after the term of extended probation expired and was offered a temporary post of

Auditor in the lower pay-scale. The appointment was subject to terms and conditions, which were issued separately. The petitioner accepted the said appointment at the post of Auditor as is lucid from his letter dated 18th September, 2002. In this letter the petitioner had requested that FR-27 and other relevant government orders should be invoked and he should be granted advance increments to overcome pecuniary hardship.

8. The petitioner appeared and cleared SOGE Part II in June, 2004. The respondent thereafter promoted the petitioner as a Section Officer vide order dated 28th January, 2005.

9. The petitioner did not challenge the order dated 5th September, 2002 by which his services were terminated and he was removed from the post of Section Officer after the probation period was over and his appointment to the post of Auditor in the lower pay-scale. The legal challenge as noticed below was made in May, 2008.

10. After the petitioner was appointed on promotion as a Section Officer, he made two representations dated 7th March, 2005 and 15th March, 2005. In the representation dated 7th March, 2005, he claimed benefit of past service and had pleaded that his present appointment should be treated in continuation of his previous service. In the representation dated 15th March, 2005, allegations with regard to the discrimination were made on the ground that one Arun Kumar

appointed as a Section Officer in Scientific Department had not cleared SOGE Part II but was not removed from service. It was contended that the condition in the Rules to clear SOGE etc. was unjustified. It was pleaded that his removal from service in September, 2002 should be declared null and void.

11. The two representations were rejected vide letters/communications dated 11th July, 2005 and 2nd September, 2005. It was mentioned that in the case of Arun Kumar, the Scientific Department had failed to implement the instructions and an inadvertent administrative lapse cannot be regarded as a precedent.

12. In spite of the rejection of the two representations in July, 2005 and September, 2005, the petitioner kept on writing letters one after the other, some of which were detailed.

13. In May, 2008, the petitioner filed O.A.No1177/2008 along with an application for condonation of delay M.A.No.940/2008. In this O.A. the petitioner had challenged the Circular Nos.10-Audit (O&M)/1998 and Circular No.506-Audit (O&M)/253-94 dated 30th October, 1998 and the order dated 5th September, 2002. By a short order dated 4th December, 2008, the O.A. and the M.A. were disposed of. The order dated 4th December, 2008, reads as under:-

“2. Applicant’s only plea before us apart from other validity of the orders is that the similarly situated persons have been allowed to get their

probations extended and were not removed as SO on direct recruitment basis.

3. In the above view of the matter, when it is reflected in the rejoinder that the cited persons have been given the benefit, we find that the respondents have no occasion to respond to the aforesaid averments.

4. It would be in the interest of justice that OA be disposed of and accordingly, we direct the respondents to consider the claim of the applicant raised in the rejoinder with all its contents by a speaking order to be passed within three months from the date of receipt of a copy of this order. It is also made clear that we have not dealt with the merit of the case and the averments raised on both sides are left open. No costs.”

14. The respondent complied with the directions given by the Tribunal and a detailed order dated 6th April, 2009 was passed rejecting the representation. The relevant portion of the said order reads as under:-

“4. Direct recruitment of Section Officers, through SSC, was started in the Department from the year 1991. Thereafter, it was also resorted to in the years 1993, 1997, 2001, 2003, 2005, 2006 and 2007. Keeping in view the poor performances of the DRSOs (P) of the 1991 and 1993 batches, it was decided in 1998 not to keep the DRSOs (P) on probation for unlimited time. Accordingly, a new para 5.5.2 was inserted in the CAG’s MSO (Admn) Vol.I, which prescribes as under :-

“Every direct recruit appointed to the cadre of Section Officer will be on probation for a period of two years. During the period of probation he/she will have to qualify the SOGE Part-II. If a direct recruit fails to pass both parts of SOGE within the period of probation, he/she will be removed from service or of fully deserving of retention, may be

offered appointment as Auditor in the respective office against a direct recruitment vacancy, if available.”

5. (i) Prior to October 1998, as there was no provision in the CAG’s MSO (Admin) Vol.I for terminating the service of the DRSOs (P) on account of not passing the SOGE within the probation period, the DRSOs (P) of 1991 and 1993 batches could not be removed from service on this ground though they failed to clear both parts of the SOGE within four years. Thus, the allegation of discrimination as pointed out in para 2(i) above is not sustainable.

(ii) During 2002, the services of the similarly placed 25 other DRSOs (P) of the same batch were also terminated due to not passing both parts of the SOGE within 04 years. Moreover, during 2002 itself, the services of 36 DRSOs (P) of the 1997 batch in the Commercial Wing were also terminated on the same ground. However, the services of 02 DRSOs (P) of the same batch, who were appointed in the office of the PDASD New Delhi, could not be terminated in 2002 due to inadvertent laps on the part of the respective appointing authority. When this fact came into the notice of the Headquarters in 2004, the concerned DRSOs had already passed the SOGE. Moreover, the benefit of an inadvertent mistake can not be extended to such cases where a conscious and judicious decision had already been taken. Thus, the allegation of discrimination as pointed out under para 2 (ii) is also not sustainable.

(iii) Further, Shri Jitendra Kumar had joined as a DRSOs (P) on 03.01.2003 and before completion of 04 years of his service on 02.01.2007, he had already appeared (sic) in the SOGE held in December-2006. He came out successful in the said examination. The probation period of Shri Jitendra Kumar was extended till the date of declaration of result of SOGE in which he had appeared within 04 years. Thus, the allegation of discrimination as pointed out under para 2(iii) is also not sustainable.”

15. The petitioner thereafter filed O.A.No.2825/2009, which has been dismissed by the impugned order dated 31st August, 2010. As noticed above, the petitioner had filed an application for review, which has been dismissed vide order dated 6th December, 2010.

16. The petitioner, who had appeared in person, had submitted that he had filed an application for condonation of delay M.A.No.940/2008 in O.A.No.1177/2008. It was pleaded that the Tribunal could have permitted and allowed the petitioner to file another application for condonation of delay, if there was lapse and default. On this ground there appears to be some merit in the contention raised by the petitioner, but we are not inclined to remit or remand the matter on this reason. We do not find any justification or good ground for condonation of delay and allow the petitioner to challenge the order dated 5th September, 2002, which was for the first time challenged in May, 2008. Order dated 5th September, 2002 was implemented and acted upon and the petitioner was appointed as an Auditor and his services as a Section Officer came to an end on expiry of the extended probation period. The petitioner accepted the said position and did not raise any objection till next three years i.e., till 7th and 15th March, 2005, when representations were made. These representations were also rejected vide letters/communications dated 11th July, 2005 and 2nd September, 2005. The petitioner waited thereafter till May, 2008, when

he filed the first Original Application No.1177/2008 alongwith M.A.No.940/2008. Order dated 4th December, 2008 quoted above cannot be regarded as an order condoning delay in filing of the original application. The Tribunal had called upon the respondent to consider the claim of the petitioner raised in the rejoinder and pass a speaking order. It was made clear that the Tribunal had not dealt with the matter on merits and averments made by both the sides were left open. The reason why the Tribunal had made reference to the rejoinder was that the petitioner had stated that similarly placed persons had been extended benefit. Indulgence, courtesy and latitude shown by the Tribunal did not amount to condonation of delay from 2002 till 2008. The order dated 26th March, 2009 was passed by the respondent on the direction of the Tribunal and not suo motu or on their own. The said order dated 26th March, 2009 does not constitute and cannot be regarded as a fresh cause of action to challenge the earlier order dated 2nd September, 2002. It is now well settled that repeated representations do not extend the period of limitation prescribed under Section 21 of the Administrative Tribunals Act, 1985. In ***Dr. Satya Prakash Vs. Government of NCT of Delhi and Others***, ILR (2009) VI Delhi 119, it has been observed as under:-

“10. Furthermore, he only kept on making representations till 2004 and approached the Tribunal for the first time by filing OA No. 393/2004. It was after 6–7

years of his purported knowledge about his position in the seniority list. Section 21 of the Administrative Tribunals Act, 1985 prescribes one year limitation for filing applications under Section 14 of the said Act. If the representation is made and the same is not decided within six months, this one year period is to be counted after the expiry of six months. Reckoning on that basis, the petitioner was supposed to file the OA within 1½ years from 14.6.2001. Therefore, even his first OA was clearly time barred.

11. It is necessary to point out at this stage that this OA was disposed of on 16.2.2004 without any notice to the respondents whereby the respondents were directed to consider the representation dated 19.1.2004 made by the petitioner. Therefore, on the basis of such an order, which was obtained in an OA that itself was time barred on the date of filing, the petitioner cannot be allowed to save limitation for him. In identical circumstances, in a recent case, the Supreme Court* has laid down this principle in the following manner: —

“14. We are constrained to refer to the several facets of the issue only to emphasize the need for circumspection and care in issuing directions for ‘consideration’. If the representation is 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.

15. The present case is a typical example of ‘representation and relief. The petitioner keeps quiet for 18 years after the termination. A stage is reached when no record is available regarding his previous service. In the representations which he makes in 2000, he claims that he should be taken back to service. But on rejection of the said representation by order dated 9.4.2002, he filed a writ petition claiming service benefits, by referring the said order of rejection as the cause of action. As noticed above, the learned Single Judge examined the claim, as if it was a live claim made in time, finds fault with the respondents for not producing material to show

that termination was preceded by due enquiry and declares the termination as illegal. But as the petitioner has already reached the age of superannuation, the learned Single Judge grants the relief of pension with effect from 18.7.1982, by deeming that he was retired from service on that day. We fail to understand how the learned Single Judge could declare a termination in 1982 as illegal in a writ petition filed in 2005. We fail to understand how the learned Single Judge could find fault with the department of Mines and Geology, for failing to prove that a termination made in 1982, was preceded by an enquiry in a proceedings initiated after 22 years, when the department in which the petitioner had worked had been wound up as long back as 1983 itself and the new department had no records of his service.”

(* ***C. Jacob vs. Director of Geology and Mining Indus. Est. And Anr.*** (2008) 10 SCC 115)

17. Supreme Court in ***Union of India and Others Vs. Tarsem Singh***, (2008) 8 SCC 648 examined the concept of ‘continuing wrong’ and “recurring/successive wrong”. The first refers to a single wrong, which causes a continuing injury and the latter refers to a wrong, which recurs periodically giving rise to distinct and separate cause of action. Following paragraphs from ***Balakrishna Savalram Pujari Waghmare Vs. Shree Dhyaneshwar Maharaj Sansthan***, AIR 1959 SC 798 was quoted:-

“31.....It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act

causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury..... “

18. Reference was made to *M.R. Gupta Vs. Union of India*, (1995)

5 SCC 628, wherein it has been observed as follows:-

“5. ... The appellant’s grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant’s claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant’s claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time-barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion, etc., would also be subject to the defence of laches, etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1-8-1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time-barred....”

19. Decision in the case of *Shiv Dass Vs. Union of India*, (2007) 9 SCC 274 was referred and the relevant paragraphs, namely, 8 and 10 were quoted. These paragraphs read:-

“8. ... 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. In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. ... If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years.”

20. Thereafter, law was summarized in *Tarsem Singh* (supra) as under:-

“7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong

creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.”

21. Turing to the facts of the present case, it is noticeable that the petitioner is not alone but there were several others, who did not clear SOGE and were removed. Others, who had cleared the examination though junior to petitioner at the time of initial appointment, were confirmed depending on the date when SOGE was cleared by them. It is also pointed out by the respondent that in 2005 services of similarly placed 25 persons were not confirmed. Raking up these issues after such a long time would result in redrawing and reopening of matters which have attained finality and are settled. Appointments and promotions made during 2002 onwards will require examination. Further, the recruitment rules and the terms and conditions of

appointment are absolutely clear. SOGE must be cleared. It is mandatory. Diluting the said condition will lead to and result in amending the said rules. Negative equality cannot be claimed. The petitioner cannot claim, as a matter of right, that the errors and mistakes made in other cases must be followed by applying the principle of equality. Petitioner cannot claim parity with DRSO (P) recruited prior to 30th October, 1998 as the recruitment rules were different at that time. Similarly, the petitioner cannot claim parity with promotees, who were permitted and allowed to appear in SOGE Part I six times and SOGE Part II on unlimited occasions. It is well settled that different criteria can be prescribed for departmental candidates for promotion and the direct recruits who recruited to the post.

22. In view of the aforesaid reasoning, we do not find any merit in the present writ petition and the same is dismissed. There shall be no order as to costs.

(SANJIV KHANNA)
JUDGE

(DIPAK MISRA)
CHIEF JUSTICE

MAY 13, 2011
NA