

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

% Date of judgment: 04.05.2011

+ **R.S.A.No.318/2007 & CM No. 17472/2011**

D.T.C. Appellant

Through: Mr. Sumeet Pushkarna and
Mr. Jitender Kumar, Advocates.

Versus

KANWAR SINGH Respondent

Through: Mr.Pradeep Kumar, Advocate.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the 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

INDERMEET KAUR, J. (Oral)

1 This appeal has impugned the judgment and decree dated 26.07.2007 which had reversed the finding of the trial Judge dated 27.11.2004. Vide judgment and decree dated the suit filed by the plaintiff Kanwar Singh seeking mandatory injunction and a declaration to the effect that the action of the defendant in not granting promotion to the plaintiff for the post of TTC w.e.f. the date when his promotion became due was illegal and arbitrary; he

be granted promotion to the post of TTC from 18.08.1984 instead of 13.09.1984 had been dismissed. The impugned judgment had reversed this finding. The suit of the plaintiff stood decreed.

2 The plaintiff was working as a trainee conductor with the DTC. He is a member of Scheduled caste (Chamar) category. He was due for promotion as TTC in August, 1984. 81 conductors were given promotion w.e.f. 18.08.1984 vide order dated 16.08.1984; out of 81 conductors, 24 conductors were junior to him; he was not considered for promotion vide order dated 16.08.1984 on the ground that he had failed to file his scheduled caste certificate. The plaintiff has filed his original certificate later. At the time of his initial appointment, he had filed attested copy of his certificate. It is also no in dispute that he is a member of the scheduled caste. The plaintiff made representations to the department but to no avail. The plaintiff was granted promotion only w.e.f. 13.09.1984 whereas he was actually entitled for promotion w.e.f. 18.08.1984; suit was accordingly filed.

3 In the written statement, it was contended that the plaintiff abided by the conditions which necessarily mandated that he had to file a certificate of his scheduled caste; he filed it late and that was the reason why the promotion was denied to him and given belatedly.

4 On the pleadings of the parties, the following five issues were framed:-

- “1. Whether any cause of action has accrued to the plaintiff to file the present suit? OPP
2. Whether the suit is barred by limitation? OPD
3. Whether the suit is bad for non-joinder of necessary parties? OPD
4. Whether the plaintiff is entitled to the reliefs as prayed for in the present suit? OPP
5. Relief.”

5 Oral and documentary evidence was led. The Court was of the view that the plaintiff was required to bring original of his caste certificate but he had failed to produce his scheduled caste certificate in time; he was at fault himself; the department had rightly granted him promotion only w.e.f. 13.09.1984. The impugned judgment as aforementioned had reversed this finding. The finding in the impugned judgment was returned as follows:-

“I have also gone through the judgments cited by the appellant at the bar. A perusal of these judgments goes to show that delay can be fatal and may deprive an incumbent of financial benefits but whenever there is continues cause of action and injustice is done the court can always interfere and grant a relief as prayed for by the incumbent.

13. In the case of Kailash Chand Yadav Vs. UOI & Ors. (supra) wherein it has been held:

.We propose to first deal with the plea regarding payment of arrears of pension to the petitioner from the date of filing of the suit instead of from the year 1988. It is the contention of the counsel appearing for the petitioner that pension is a continuing cause of action and that the prayer for payment for the same cannot be denied and defeated on the ground of limitation and delay. It is submitted that right to get pension is merely a bounty but is a right to property and, therefore, the petitioner should have been paid arrears of pension from date of the order of his compulsory retirement in the year 1988.

We have considered the said submissions of the counsel appearing for the petitioner. There can be no denial of the fact that pension is a continuing

cause of action and ordinarily in matters relating to pension the relief is generally granted. However, cause of action for claiming pension for the year 1988 and onwards had occurred on the month on which it fell due and payable to the petitioner by the respondent. The petitioner, however, did not choose to claim the same for a long eleven years. He has chosen to sleep over his rights for all this long period. In two decisions, namely in the decision of Sri Bhagvan Vs. Union of India and Others, 103 (2003) Delhi Law Times 269 and Bachan Kaur Vs. Union of India WP (C) No. 621 of 1989 disposed of on 13.04.1985, the Division Bench of this Court has taken a view that the plea claiming pension, if the claim is otherwise legal and valid may be entertained and allowed limiting the same to a period of three years prior to the filing of the writ petition. The aforesaid view was also reiterated in a subsequent Division Bench decision of this Court in Balbir Singh and other batch matters WP (C) No. 570/1990 disposed of on 17.12.2004).

Accordingly, we allow the writ petition to the aforesaid extent directing the respondent to pay to the petitioner arrears of pension for a period of three years preceding the filing of the OA before the Tribunal, and the same shall be paid as arrears till full payment is made in that regard. In any case, there was delay in filing the original application before the Tribunal and the petitioner slept over his rights for long eleven years and, therefore, it is the petitioner who is to be blamed for not enforcing his right well within the period of limitation. Therefore, we are inclined to grant any interest in favour of the petitioner on the amount payable as arrears of pension.

14. Taking all the facts into consideration I am of the considered view, that the findings returned by the trial court in respect of the issue no. 1 on the basis of which he dismissed cannot be sustained even though, the appellant may not be entitled to financial benefits for the entire period. Consequently, while reversing the finding of issue no. 1 I also hold, that in the facts and circumstances of this case and applying the theory of preponderance of probability which is also in favour of the respondent in as much as once he was selected as a Scheduled Caste and then working with the respondent right from the beginning 1977 he cannot be deprived from the promotion merely because he did bring the original certificate at the time of initial interview of 1984 as he was eligible for promotion and was promoted just after one month. In such circumstances it was incumbent upon the respondent to have consulted their own record including the verification of the record of the appellants produced earlier for holding as to whether he was a Scheduled Caste candidate or not. Consequently, the impugned judgment is set aside with a direction to treat the appellant as TTC from the date on which his juniors were promoted i.e. [w.e.f. 18.8.1984](#) and also to treat him as senior clerk from the date on which his juniors were promoted. However, the financial benefits shall only be granted with effect from the date on which he filed the suit after fixing his pay notion as Senior Clerk as on the date of filing of the suit i.e. 23.11.1993 by treating him promoted [w.e.f. 18.8.1984](#). He would also be entitled to all consequential benefits but the financial benefits will be payable to the appellant only with effect from the date of filing of the suit. With these observations the trial court judgment is reversed and appeal is allowed to the extent as aforesaid."

6 This is a second appeal. It has been admitted and on 18.12.2007, the following two substantial questions of law were formulated:-

- “1. Whether the suit filed by the respondent was barred by limitation?
2. Whether the suit was maintainable without impleading persons who were likely to be affected by the decree?

7 On behalf of the appellant, it has been urged that the suit was barred by limitation; it was filed in the year 1996 when admittedly the promotional benefits by which the plaintiff was aggrieved are of dated 13.09.1984. Even the representations made by the plaintiff commenced only in the year 1991 which was again belatedly. Suit not having been filed in time, it was rightly dismissed by the trial Judge. To support this submission on limitation, learned counsel for the appellant has placed reliance upon (1989) 4 SCC 582 S.S. Rathore Vs. State of Madhya Pradesh as also another judgment of the Apex Court reported in (2006) 11 SCC 464 U.P. Jal Nigam And Another Vs. Jaswant Singh And Another. Attention has also been drawn to the testimony of PW-1 wherein in his cross-examination he has admitted that he was satisfied with his promotional benefits; it is pointed that there was an acquiescence also on the part of the plaintiff. The second argument of learned counsel for the appellant is that the

impugned judgment has disturbed the seniority list in as much as the plaintiff has been directed to be granted promotion w.e.f. 18.08.1984 thereby disturbing the seniority of persons who had been promoted in this intervening period; these persons were not parties to the suit; the impugned judgment is a perversity on this count as well. For this proposition reliance has been placed upon the judgment reported in (1974) 1 SCC 317 Ramchandra Shankar Deodhar Vs. The State of Maharashtra & Others.

8 Arguments have been rebutted. It is pointed out that the impugned judgment calls for no interference.

9 Record has been perused.

10 Admittedly the plaintiff was a member of scheduled caste. He had been inducted into the service of DTC as a conductor. He was in the scheduled caste category even at that time. At the time of his promotion, the department had demanded certain certificates which included a scheduled caste certificate. The original was not submitted by the plaintiff in time; it was produced later; it is however not in dispute that the attested copy of the scheduled caste certificate of the plaintiff was already on the record of the department. The plaintiff having furnished his certificate belatedly, he was granted promotion only w.e.f.

13.09.1984; his contention that he should have been granted
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promotion along with other conductors w.e.f. 18.08.1984 had been repelled; other persons in this intervening period had been promoted.

11 The two substantial questions of law which have been formulated by this Court have to be answered.

12 On the question of limitation, the plaintiff in his plaint had averred that he had submitted the representations on 17.07.1991 and on subsequent dates thereafter. In his deposition on oath, he has stated that when he did not get his promotion from the due date, he had approached the concerned authorities. He had on oath deposed that his name did not figure in the promotion list of 16.08.1984; he had approached the department when they had given assurance that he would be promoted from the due date if he furnishes his caste certificate; even after the furnishing of his scheduled caste certificate, his name did not appear in the subsequent order of 11.09.1984 where certain other conductors were also promoted; he has deposed that he had approached the concerned authorities and submitted representations and thereafter in writing given further representations on 17.07.1991 and thereafter. PW-1 had detailed the period of time when he was pursuing his denial of promotion; the details have been given in

his deposition. The admission in the cross-examination that he had

not made any written representation prior to 1991 is explained when he volunteered that he was not satisfied with the date of his promotion; he was pursuing his case in this intervening period. The plaintiff had deposed that for the first time by a written communication dated 08.04.1993 he was conveyed that his representations have been rejected; this was vide Ex. PW-1/28; he has further deposed that he was not communicated with any other order of the CMD of the DTC; after receipt of communication dated 08.04.1993 rejecting his representations, he has not sent a legal notice Ex.PW-1/29 and thereafter filed the present suit.

13 The impugned judgment had appreciated these facts in the correct perspective. It had noted that this was a continuing cause of action and the appellant was pursuing it. The judgment of Kailash Chandra Yadav Vs. UOI & Ors. passed in W.P.(C) No. 1814/2001 had been relied upon in this context. In that case also, the Division Bench had noted that when the plea of the party which in that case was a plea claiming pension, is otherwise legal and valid it may be entertained and allowed limiting the same to a period of three years prior to filing of the petition. In the present case also, the impugned judgment has granted financial benefits to the appellant only three years prior to the date of filing of suit

i.e. w.e.f. 23.11.1993. The impugned judgment does not suffer
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from any perversity on this score.

14 Reliance by the learned counsel for the appellant on the judgment of S.S. Rathore & U.P. Jal Nigam are misplaced. In the case of S.S. Rathore, the Apex Court had in fact remanded the matter back to the trial court for a decision as to whether Article 58 of the Schedule of the Limitation Act or Article 113 would be applicable. The judgment of U.P. Jal Nigam was a case where the party had acquiesced with the situation. This is certainly not one such case. The plaintiff had been agitating his case.

15 Substantial question of law No. 1 is answered in favour of the respondent and against the appellant.

16 Substantial question of law No. 2 is also answered in favour of the respondent and against the appellant. This substantial question of law does not emanate from the pleadings. It was never the contention of the defendant in his defence (as is evident from the written statement) that if promotion is granted to the petitioner w.e.f. 13.09.1984, the promotional avenues of other incumbents would be disturbed. The preliminary objection which comes closest to this defence is a defence of mis-joinder of parties; this was a general plea and cannot encompass the argument now urged before this Court. The impugned judgment

had noted this argument and answered it in para 11; it reads as
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under:-

“ However, this objection is of no consequence because for a person who challenges seniority list, it is not necessary for him to implead the person who are his juniors, because the relief is claimed against the Government. In this regard reference can be made to the judgment delivered in the case of Shri V.K. Sagarani Vs. UOI & Ors. (supra). Same is the view taken in the third judgment cited by the appellant delivered in the case of D.P.S. Ahuja Vs. UOI and by the Hon'ble Supreme Court of India in the case of M.R. Gupta Vs. UOI (supra). In the aforesaid case it has been held that in a case where the cause of action for filing of the suit is fixation of pay in accordance with rule the claim to pay the correct salary calculated on the basis of proper pay fixation is a right which subsist during the entire tenure of service and furnishes a continuing cause of action. Reliance can also be made in AIR 1991 SC 424.”

17 The relief was sought against the Government; even otherwise this plea cannot be raised at the second appellate court when it was never a plea taken in the court below.

18 In AIR 2001 SC 965 Santosh Hazari Vs. Pursushottam Tiwari, the Supreme Court had been held that a plea not emanating from the pleadings between the parties cannot be raised for the first time before the second appellate Court; such a plea would not amount to a substantial question of law.

19 The judgment of Ramchandra Shankar Deodhar has no application. In that case the necessary parties were all before the Court; in the present case contention now raised was never an argument raised earlier.

20 Substantial question of law No. 2 is also answered in favour

of the respondent and against the appellant. Appeal has no merit.
Appeal as also pending application are dismissed.

MAY 04, 2011

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INDERMEET KAUR, J.