

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% Judgment reserved on: 13.4.2012
Judgment pronounced on: 23.04.2012

+ W.P.(C) 3992/2011

R.K.Kapoor

..... Petitioner

versus

Union of India

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Jayant Nath, Sr. Advocate with Mr. B.C.Pandey & Mr. S.P.Kamrah
For the Respondent : Mr. R.V.Sinha & Ms. Sangita Rai

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE V.K.JAIN

V.K. JAIN, J.

This writ petition is directed against the order dated 5.4.2010 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as the Tribunal) whereby OA No. 994/2010 filed by the petitioner was dismissed. The facts giving rise to the filing of this writ petition can be summarized as under:

The petitioner joined as Appraiser of Customs, in the Customs and Excise Service, in the year 1964. In the year 1976, he was promoted as Assistant Collector on ad-hoc basis and his services as Assistant Collector were regularized in August, 1978. On 23.5.1991, he was promoted as Deputy Collector on ad-hoc basis. The petitioner superannuated from service of the Government on 31.3.1995. The issue

of seniority of promotees vis-à-vis direct recruits had been a matter of litigation and was finally resolved by the Supreme Court vide judgment dated 8.5.1996, inter alia, directing that a fresh All India Combined List of Appraisers be prepared on the basis of continuous officiation of the incumbent in the post of Appraiser appointed on and from the date of Customs Appraisers Service, Class II Recruitment Rules 1961. By another judgment delivered in November, 1996, the Supreme Court directed review of the ad-hoc appointments made in the grade of Assistant Collector and also directed preparation of a joint seniority list of promotees and direct-recruits to the post of Assistant Commissioner. Consequently, 16 Deputy Collectors were promoted to the Non-Functional Selection Grade (NFSG) vide order dated 1.4.1997. 52 more Deputy Collectors were promoted vide order dated 27.8.1997 w.e.f. 1.7.1995 onwards. The revised seniority lists of Appraisers and Assistant Collectors were issued on 12.11.1997 and 30.11.2000 respectively. Consequently, vide order dated 3.5.2002, the petitioner was promoted to the post of Deputy Collector on a regular basis w.e.f. 1.1.1990.

The Customs and Excise Service Rules inter alia provided that on stagnating at the maximum scale of pay of Grade IV for two years the officer was entitled to grant of Grade-III i.e. Non Functional Selection Grade (NFSG). Vide GSR 794(E) dated 17.9.1987, it was prescribed that appointment to Grade-III shall be by

promotion on the basis of seniority, subject to rejection on unfitness. The petitioner made a representation seeking promotion to the Non-Functional Selection Grade (NFSG) on the ground that he, having been regularly promoted w.e.f. 1.1.1990, was entitled to grant of the said scale on his stagnating at the maximum of pay scale of Grade-IV. He also claimed that the notification whereby he was regularized w.e.f. 1.1.1990 was never communicated to him and therefore he was not aware of the same. He claimed that this fact came to his knowledge only on receipt of a letter dated 1.1.2009 received from his junior colleague Mr. R.S.Rajan. The respondent vide letter dated 5.1.2010 rejected the representations of the petitioner on the ground that NFSG to his juniors was granted w.e.f. 1.1.1998 and after his retirement from service. Being aggrieved by the rejection of his representations the petitioner filed OA No. 994/2010 which came to be dismissed by the impugned order dated 5.4.2010. The OA was dismissed for two reasons. The first reason given by the Tribunal for dismissing the OA was that the juniors of the petitioner got NFSG w.e.f. 1.1.1998 and the OA having been filed in the year 2010 was barred by limitation. The second reason given by the Tribunal for dismissing the OA was that the petitioner had retired from service on 31.3.1995 whereas his juniors were given NFSG w.e.f. 1.1.1998 more than after two years after his retirement and therefore, he was not entitled to NFSG.

2. It is an admitted position before us that the petitioner had stagnated for more than two years at the maximum of the pay-scale of Grade-IV, before he superannuated on 31.3.1995. It is also an admitted case that the petitioner was promoted on regular basis w.e.f. 1.1.1990. It is also not in dispute that those who were junior to the petitioner in the cadre, in which he was working at the time of his retirement, were granted NFSG, though after he had retired from service. The very fact that the respondents granted regular promotion to the petitioner w.e.f. 1.1.1990 clearly shows that the respondents were in the wrong in not promoting him before his superannuation on 31.3.1995. Had the petitioner been promoted w.e.f. 1.1.1990, before he retired from service on 31.3.1995, indisputably, he would have been entitled to be considered for grant of NFSG, on stagnating for two years at the maximum of the pay scale applicable to Grade-IV, in which he was working at the time of his superannuation. The respondents cannot be allowed to take advantage of their own mistake, by denying NFSG to the petitioner solely on the ground that he had superannuated from service before this benefit was extended to his juniors. No rule providing that a person granted retrospective promotion would not be considered for grant of NFSG, merely on account of his superannuation, in the meanwhile, has been brought to our notice. Therefore, we cannot accept the contention that the respondents cannot consider the petitioner for grant of NFSG

despite his otherwise being entitled to such consideration, merely because he has since retired from service.

3. As regards limitation, the learned Counsel for the petitioner has contended that the petitioner was subjected to a continuous wrong on account of the actions of the respondents in denying NFSG to him despite his being otherwise entitled to be considered for the same and therefore, the period of limitation prescribed in Section 21 of the Administrative Tribunals Act would not apply. In this regard he has placed reliance upon **Union of India And Others v. Tarsem Singh: (2008) 8 SCC 648.**

In **M.R.Gupta v. Union of India: (1995) 5 SCC 628,** M.R.Gupta, the appellant before the Supreme Court had approached the High Court in the year 1989 with a grievance with respect to his initial pay fixation w.e.f. 1.8.1978. His claim was rejected on the ground that it had been raised after 11 years. Setting aside the decision of the High Court, Supreme Court inter alia held as under:

“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....”

In ***Tarsem Singh*** (supra), the respondent was declared invalid from army service on 13.11.1983. He approached the High Court in the year 1999 for grant of disability pension. The learned Single Judge allowed the writ petition but restricted arrears to a period of three years and two months prior to filing of the writ petition. The Division Bench, however, allowed the arrears w.e.f. 31.11.1983 itself. Referring to ***M.R. Gupta*** (supra) and other decisions, the legal position with respect to applicability of limitation in case of continuous/recurring wrongs was summarized by the Supreme Court as under:

“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 re-opening 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 re-fixation 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. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, 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.”

4. The proposition of law which emerges from these decisions is that ordinarily, the limitation prescribed in Section 21 of the Administrative Tribunals Act needs to be applied wherever the remedy sought by the applicant before the Tribunal is barred by limitation. If, however, a continuous/recurring wrong has been caused to the applicant, and he is otherwise found entitled to the relief claimed by him, the relief should not be denied to him only on account of delay in approaching the Court/Tribunal. If the relief sought by the applicant before the Court/Tribunal, if granted, is related to or likely to affect other persons, the Court/Tribunal would not be justified in granting such a relief, even if the applicant

is otherwise entitled to it on merits, the logic behind the approach being that the rights having implications on third parties, cannot be enforced when the applicant approaches the Court/Tribunal after expiry of the prescribed period of limitation. If, on account of the relief claimed by the applicant, a settled seniority is likely to be disturbed or someone is likely to lose the promotion or the promotional grade already granted to him, the Court would apply the law of limitation and deny relief to a person who has not been vigilant in seeking enforcement of his rights. But, where the wrong caused to a person is a recurring/continuous wrong and no other person is likely to be prejudicially affected on account of grant of relief sought by him, the Court/Tribunal would not be justified in denying the relief to which the applicant is otherwise entitled on merits, merely on ground of limitation.

5. In the case before us, it is nowhere the case of the respondents in the counter affidavit filed by them, that if NFSG is granted to the petitioner it would result in withdrawal of such a benefit from some other person to whom it has already been granted. Therefore, it cannot be said that the relief sought by the petitioner, if granted, would affect any third party interest created in the meanwhile.

6. In our view, grant of NFSG though termed as a promotion, cannot be treated at par with promotion from one rank/position to another in the hierarchy of ranks/positions. Grant of such a non-functional benefit which is granted to an employee on account of his stagnating at the maximum of pay-scale, in which he is

placed, is only a sort of monetary compensation to him on account of his stagnating at the maximum of the pay scale applicable to him.

7. Section 20 of the Administrative Tribunals Act, 1985, to the extent it is relevant, provides that a Tribunal shall ordinarily admit an application unless it is satisfied that the applicant had availed of all the remedies available to him under the relevant service rules as to redressal of grievance. For this purpose, a person shall be deemed to have availed of all the remedies available to him under the service rules as to redressal of grievance, if a final order has been made rejecting any appeal preferred or representation made by such a person in connection with his grievance. It further provides that where no such final order is made, the applicant shall be deemed to have availed all the remedies available to him, if a period of 06 months from the date of his appeal/representation has expired. Section 21 of the Administrative Tribunals Act, to the extent it is relevant, provides that the Tribunal shall not admit an application, in a case where a final order such as is mentioned in Clause (a) of Sub-Section 2 of Section 20 has been made, in connection with grievance, unless the application is made within one year from the date such final order is made. In the case before us, admittedly, the order was passed by the respondents on 5.1.2010 rejecting the representation of the applicant regarding his promotion. Having been filed on 5.4.2010, the OA, therefore, cannot said to be barred by limitation prescribed under Section 21 of the Administrative

Tribunals Act. It also appears from the petition that the first representation was allegedly made by the petitioner on 5.3.2009 though according to the respondents, it was made in April, 2009. Even if the period of limitation is considered from the date of making the first representation, it would expire only on 4.9.2010 and the OA would not be barred by limitation. It was contended by the learned Counsel for the respondents that since the petitioner was promoted as Deputy Collector on a regular basis on 3.5.2002, he ought to have made representation soon thereafter, in case he was aggrieved on account of the NFSG not being granted to him. The case of the petitioner in this regard, as disclosed in para 14 of the writ petition, is that he came to know of his retrospective promotion only when the VIth Pay Commission Report was implemented in September, 2008 and further confirmation was made when a junior colleague Mr. R.S.Rajan vide a letter dated 1.1.12009 informed him that he had been granted Selection Grade by an August, 1997 order. A copy of that letter has been annexed as Annexure P-7 to the writ petition. In the counter affidavit, this averment made by the petitioner has not been specifically controverted by the respondents and in any case this is not the case of the respondents that the order whereby retrospective promotion on regular basis was granted to the petitioner, vide order dated 3.5.2002, was served upon the petitioner at any time prior to September, 2008. Hence, it cannot be said that making of the representation was unduly delayed by the petitioner.

8. For the reasons given in the preceding paragraphs, we direct the respondents to consider the petitioner for grant of Non-Functional Selection Grade, on the date he stagnated for two years at the maximum of pay scale in which he was placed at the time he superannuated, subject to a vacancy in the said Non-Functional Selection Grade being available on that date and the petitioner being eligible to grant of Non-Functional Selection Grade against that vacancy. If the vacancy, against which Non-Functional Selection Grade could be granted to the petitioner, was not available on the date he completed two years of stagnation at the maximum of the pay scale but became available later at any time prior to his superannuation on 31.3.1995, the respondents would consider the petitioner for grant of the said Non-Functional Selection Grade with effect from that date. We also make it clear that while considering the petitioner for grant of Non-Functional Selection Grade in terms of this order, the respondent would apply those rules, which were in force at the time the vacancy against which the petitioner is considered, arose.

The writ petition stands disposed of in terms of this order. There shall be no order as to costs.

V.K.JAIN, J

BADAR DURREZ AHMED, J

APRIL 23, 2012

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