

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No.707 of 2016(O&M)
Date of decision: 07.03.2017

Sushil Kumar

.... Appellant

VS

Uttar Haryana Bijli Vitran Nigam Ltd. & anr.

.... Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. S.P.Arora, Advocate
for the appellant.

Mr. R.D.Bawa, Advocate
for the respondents.

Rajiv Narain Raina, J.(Oral)

CM No.1902-C of 2016

This is an application for condoning the delay of 708 days in filing the appeal.

Since substantial question of law arises for consideration of this Court, then justice demands that the delay, which by any standards is huge, in filing the appeal deserves to be condoned.

Therefore, the application under Section 5 of the Limitation Act, 1963 is allowed.

RSA No.707 of 2016

The few necessary facts first are in order. The plaintiff/appellant – Sushil Kumar was appointed as Lower Division Clerk (LDC) on ad hoc basis vide appointment letter dated 21.07.1998 (Ex. D-1) in the respondent Uttar Haryana Bijli Vitran Nigam Ltd. Condition No.6 of the appointment letter provided that the plaintiff was entitled to draw annual

increments as well as have a right to regularisation of his services subject to qualifying the type test in Hindi/English within a period of two years in four chances from the date of joining. This would mean that the internal test was to be conducted biannually by the department. It was the categorical assertion of the plaintiff-appellant that he got the first opportunity to appear in type test held for the first time after 1998 on 16.09.2008. In the first attempt he could not qualify the test. The appellant appeared in the test held in December 2008 and cleared the same. Consequently, the services of the plaintiff – Sunil Kumar were regularised w.e.f. 22.12.2008 after he cleared the type test held on 02.12.2008.

The defendants to make way for defence of the suit could not say much except to advert to and place on record the Memorandums dated 13.09.2005 Ex.D2, dated 04.10.2007 Ex.D4, dated 26.11.2007 Ex.D5, dated 29.11.2007 Ex.D6 and lastly dated 11.09.2008 Ex.D9 vide which the plaintiff was directed to appear in the type test. There was no pleaded refutation by the defendants against the plea that type tests were not conducted from 1998 till at least 2005.

I do not find any clear evidence on record of the fact that type tests were held at any time between 1998 and 2008. The very first Memorandum dated 13.09.2005 Ex.D2 suggests that no steps were taken by the department to conduct test anytime between 1998 and 13.09.2005 at least. Both the Courts at Karnal have dismissed the suit wherein the appellant claimed regularisation from the date of appointment than to the date he was regularised ultimately on 22.12.2008 with consequential benefits. The plaintiff was not paid six annual increments and further three from 2005.

If the condition precedent in the appointment letter was not fulfilled by the department by holding tests regularly then it does not lie in its mouth to deny relief to the plaintiff at least on the date when two years expired from the date of appointment. Had the test been conducted with the regularity assured in the first two years of appointment, then the plaintiff would have had opportunity to compete in order to secure for himself the right to increments and regularization; a right conferred by the appointment letter itself. If the type test was not conducted between 1998 to 2008, then the contention of Mr. S.P. Arora for the appellant that the condition of type test would stand waived by passage of time because the rule engrafted in the letter of appointment was abjectly broken down by the department itself, may not be unfounded argument.

In case we view the facts of this case as an appointment with right to increments and regularisation conditional and dependent in the future, defined by passing of the prescribed type test then evidently the first opportunity presented itself only in the year 2008 then the regularization would have to be dated back to the initial date of appointment or on expiration of two years, as the case may be, then the ratio in the **State of West Bengal & ors. vs. Aghore Nath Dey & ors., (1993) 3 SCC 371** would come to the rescue of the plaintiff, that is, the defect in the appointment was cured on first opportunity and would relate back. In the absence of primary evidence of physical holding of tests in the 9 years that intervened duly produced on record with facts and figures then the burden was on the department to discharge to refute the claim of the plaintiff which the defendants failed to discharge by bringing on file cogent evidence to postpone if not deny the claim. Accordingly, I see no reason why this Court

should not assume that no type test in Hindi/English was held till 2008. In view of this factual position the plaintiff has a case for antedating the increments and the regularisation which could not be postponed by inactivity and thus the lower Courts were able to appreciate in the correct perspective for which reason the judgments and decrees of the lower courts cannot be sustained.

While the suit of the plaintiff was dismissed by the Court at Karnal at the same time similar claims pleaded in identical circumstances by similarly situated persons in the same organisation were decreed by another Court of Karnal, where relief has been granted as claimed by the plaintiff/appellant in the Civil Suit No.140/14 of ***Subash Chand vs. Uttar Haryana Bijli Vitran Nigam Ltd. and anr.*** decided on 28.01.2015 and in civil appeal No.107 of 2011 of ***Uttar Haryana Bijli Vitran Nigam Ltd. and ors. vs. Vinod Kumar*** decided on 03.05.2012.

This conflict of opinion which has arisen has to be removed and there is a valuable opportunity to do so in this appeal. The employee was similarly placed in the same organization with the same dispute regarding type test.

The core issues were unfortunately not addressed by either of the Courts when they casually dismissed the suit on irrelevant considerations. The only relevant consideration, to my mind, has been discussed above as the legal position obtaining on facts when the terms and conditions in the appointment letter and passing of the prescribed test were disregarded by the defendant Nigam by failure to offer a periodic opportunity to the plaintiff to pass the test.

As a result, the judgment and decree appealed against suffers

from grave error of law and fact and is therefore set aside with costs throughout to the credit of the plaintiff. Hence, the suit of the plaintiff is decreed as prayed for in the suit in his favour and against the defendants. Pay etc. of the plaintiff be redetermined and arrears handed over within three months.

(RAJIV NARAIN RAINA)
JUDGE

07.03.2017

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| <i>1. Whether speaking/non-speaking?</i> | <i>Yes</i> |
| <i>2. Whether reportable/non-reportable?</i> | <i>No</i> |