

***THE HON'BLE SRI JUSTICE P.NAVEEN RAO**

+ WRIT PETITION NO. 27397 of 2018

% 23.08.2018

M N Gulsani S/o M L Gulsani
74 years Retd Sub Treasury Officer
H No. 3-1-50/1, Medak Town, Medak

... Petitioner

Vs.

\$ The State of Telangana
Rep by its Principal Secretary
Finance Department, Secretariat, Hyderabad and others

Respondents

.... Respondents

!Counsel for the petitioner : Sri D Linga Rao

Counsel for the Respondents : Assistant Government Pleader –Services –I (TG)

<Gist :

>Head Note:

? Cases referred:

AIR 1996 SC 669
AIR 1997 SC 27
2002 (1) ALD 489 (DB)
(2011) 5 SCC 607
AIR 2009 SC 571
(1989) 4 SCC 582
(1998) 2 SCC 523
(2010) 12 SCC 471
2018(1) ALD 385



**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

WRIT PETITION NO.27397 of 2018

Between:

M N Gulsani S/o M L Gulsani
74 years Retd Sub Treasury Officer
H No. 3-1-50/1, Medak Town, Medak

Petitioner

And

The State of Telangana
Rep by its Principal Secretary
Finance Department, Secretariat, Hyderabad and others

Respondents

JUDGMENT PRONOUNCED ON : 23.8.2018

THE HON'BLE SRI JUSTICE P.NAVEEN RAO

1. Whether Reporters of Local Newspapers may :
Be allowed to see the Judgments ? : YES
2. Whether the copies of judgment may be marked :
To Law Reporters/Journals : YES
3. Whether Their Ladyship/Lordship wish to :
See fair Copy of the Judgment ? : NO

HONOURABLE SRI JUSTICE P. NAVEEN RAO

WRIT PETITION No. 27397 of 2018

Date : 23.8.2018

Between:

M N Gulsani S/o M L Gulsani
74 years Retd Sub Treasury Officer
H No. 3-1-50/1, Medak Town, Medak

Petitioner

And

The State of Telangana
Rep by its Principal Secretary
Finance Department, Secretariat, Hyderabad and others

Respondents

The Court made the following:



HONOURABLE SRI JUSTICE P. NAVEEN RAO

WRIT PETITION No. 27397 of 2018

ORAL ORDER:

Facts as averred in the affidavit filed in support of the writ petition would disclose that petitioner was initially appointed as Lower Division Accountant on 16.7.1967 by direct recruitment mode in the selections conducted by A.P. Public Service Commission. By the year 1977 he was eligible for promotion as Upper Division Accountant (for short UDA). Ignoring him for promotion, Mr V C Johnson and others, who joined service in the year 1976, were promoted as UDA in July, 1977. Though, petitioner represented against said promotions, same was not granted. Petitioner was promoted as UDA on 17.7.1980 and further promoted as Sub Treasury Officer vide proceedings dated 6.1.1999. He took retirement from service on 31.3.2002 while working as Sub Treasury Officer.

2. This writ petition is filed praying to issue writ or direction, more particularly one in the nature of writ of mandamus and to declare the action of respondents in not assigning notional seniority to the petitioner in the cadre of Senior Accountant (previously known as UDA) on par with his junior from the year 1977 with all consequential benefits.

3. Heard Sri D Linga Rao and learned Assistant Government Pleader for Services-I.

4.1 According to learned counsel for petitioner, petitioner was denied promotion and junior to him was promoted, therefore, petitioner is entitled to restoration of his seniority on par with his junior. By promoting junior and ignoring the petitioner, Articles 14 and 16 of the Constitution of India are violated. He further submitted that promotion as per his turn and ahead of juniors is a vested right and not granting such promotion is illegal.

4.2. He would submit that as per third proviso appended to Rule 17 of Telangana Ministerial Service Rules, 1998, Government can undertake review of promotions granted earlier, rectify the illegality committed and to grant the relief. To exercise this power, as no time limit is prescribed in the Rules, such power can be exercised at any time to remove the illegality caused earlier. From 4.2.2014 onwards, Government has been corresponding with subordinate authorities and calling for information on the representation made by the petitioner, but so far, the issue is not finalised.

4.3. It is open to an employee to assert his right and to seek enforcement of the right when such right is violated. He would submit that delay should not come in the way of enforcing substantive right vested in him. In support of his contention that prayer to grant notional seniority on par with junior is a continuous cause of action and the relief prayed by the petitioner is maintainable, learned counsel for petitioner placed reliance on the decisions of the Supreme Court in **M.R. Gupta Vs Union of India and others**¹, **S.R. Bhanrale Vs Union of India and others**² and decision of Division Bench of this Court in **M. Vijaya Bhaskara Reddy Vs High Court Of AP**³.

5. The point for consideration is whether the claim of petitioner to grant seniority from retrospective date, i.e., from the date of promotion of alleged juniors in the year 1977 is hit by delay and laches?

6. The writ remedy is discretionary remedy. Though no limitation is prescribed to entertain a writ petition under Article 226 of the Constitution of India and no fetters are imposed on writ Court to entertain a writ petition, the principle of law is well settled that a person, who seeks intervention of the High Court under Article 226 of Constitution of India, should invoke the jurisdiction of this Court immediately after arising of cause of action and at any rate within

¹ AIR 1996 SC 669

² AIR 1997 SC 27

³ 2002 (1) ALD 489 (DB)

a reasonable time. Ordinarily, the reasonable time in prosecuting the writ remedy is the time available to prosecute civil law remedy. Anything beyond that cannot be said as reasonable for prosecuting the writ remedy. Whenever, there is delay in filing writ petition, detailed reasons must be assigned with supporting material. The burden is heavy on petitioner to explain the delay in filing the writ petition when such delay is unreasonably long.

7. In ***Shankara Co-op. Housing Society Ltd., Vs M. Prabhakar and others***⁴, on detail consideration of the various judgments on the issue of maintainability of the writ petition filed after long lapse of time, the Supreme Court laid down the parameters for entertaining the writ petition. They read as under:

“The relevant considerations, in determining whether delay or laches should be put against a person who approaches the writ court under Article 226 of the Constitution is now well settled. They are : (1) there is no inviolable rule of law that whenever there is a delay, the court must necessarily refuse to entertain the petition; it is a rule of practice based on sound and proper exercise of discretion, and each case must be dealt with on its own facts. (2) The principle on which the court refuses relief on the ground of laches or delay is that the rights accrued to others by the delay in filing the petition should not be disturbed, unless there is a reasonable explanation for the delay, because court should not harm innocent parties if their rights had emerged by the delay on the part of the petitioners. (3) The satisfactory way of explaining delay in making an application under Article 226 is for the petitioner to show that he had been seeking relief elsewhere in a manner provided by law. ***If he runs after a remedy not provided in the Statute or the statutory rules, it is not desirable for the High Court to condone the delay.*** It is immaterial what the petitioner chooses to believe in regard to the remedy. (4) No hard and fast rule, can be laid down in this regard. Every case shall have to be decided on its own facts. (5) That representations would not be adequate explanation to take care of the delay” (Para 53).
(emphasis supplied)

7.1. In that case there was delay of 15 years and the court noticed that there was no serious effort made to prosecute the litigation and the reasons for delay in instituting the writ petition were not properly explained and on the

⁴ (2011) 5 SCC 607

ground of inordinate delay in instituting the writ petition, the issue was answered against the State.

8. In *City Industrial Development Corporation V Dosu Aardeshir Bhiwandiwala and Others*⁵, the Supreme Court held as under :

“A writ of Mandamus is highly discretionary. The relief cannot be claimed as of right. One of the grounds for refusing relief is that the person approaching the High Court is guilty of unexplained delay and the laches. Inordinate delay in moving the court for a writ is an adequate ground for refusing a writ. The principle is that courts exercising public law jurisdiction do not encourage agitation of stale claims and exhuming matters where the rights of third parties may have accrued in the interregnum.”
(emphasis supplied)

9. In *S.S.Rathore Vs State of M.P.*⁶, question considered by Constitution Bench of 7 Judges, was when the right to sue first occurs. On review of precedent decisions, Supreme Court held:

“18. We are satisfied that to meet the situation as has arisen here, it would be appropriate to hold that the cause of action first arises when the remedies available to the public servant under the relevant Service Rules as to redressal are disposed of.

.....

20. We are of the view that the cause of action shall be taken to arise not from the date of the original adverse order but on the date when the order of the higher authority where a statutory remedy is provided entertaining the appeal or representation is made and where no such order is made, though the remedy has been availed of, a six months' period from the date of preferring of the appeal or making of the representation shall be taken to be the date when cause of action shall be taken to have first arisen. We, however, make it clear that this principle may not be applicable when the remedy availed of has not been provided by law. Repeated unsuccessful representations not provided by law are not governed by this principle.

.....

22. It is proper that the position in such cases should be uniform. Therefore, in every such case only when the appeal or representation provided by law is disposed of, cause of action shall first accrue and where such order is not made, on the expiry of six months from the date when the appeal was filed or representation was made, the right to sue shall first accrue. *Submission of just a memorial or*

⁵ AIR 2009 SC 571

⁶ (1989) 4 SCC 582

representation to the head of the establishment shall not be taken into consideration in the matter of fixing limitation.”

10. A reading of the affidavit and the prayer would make it clear that the petitioner filed this writ petition as if he has reserve right to assert his claim for seniority and that he can enforce such right at any time he would wish, to be precise, after 40 years.

11. With reference to claims to seniority, in the two following decisions, Supreme Court held writ petition should not be entertained, if it is filed after inordinate delay.

11.1 In **B.S. Bajwa Vs State Of Punjab**⁷, Supreme Court, held as under:

“7. Having heard both sides we are satisfied that the writ petition was wrongly entertained and allowed by the Single Judge and, therefore, the judgments of the Single Judge and the Division Bench have both to be set aside. *The undisputed facts appearing from the record are alone sufficient to dismiss the writ petition on the ground of laches because the grievance was made by B.S. Bajwa and B.D. Gupta only in 1984 which was long after they had entered the department in 1971-72. During this entire period of more than a decade they were all along treated as junior to the other aforesaid persons and the rights inter se had crystallised which ought not to have been reopened after the lapse of such a long period.* At every stage others were promoted before B.S. Bajwa and B.D. Gupta and this position was known to B.S. Bajwa and B.D. Gupta right from the beginning as found by the Division Bench itself. *It is well settled that in service matters the question of seniority should not be reopened in such situations after the lapse of a reasonable period* because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition.” (emphasis supplied)

11.2 In **Shiba Shankar Mohapatra Vs State Of Orissa**⁸, on a review of law on the maintainability of stale claims on seniority, Supreme Court held:

18. The question of entertaining the petition disputing the long-standing seniority filed at a belated stage is no more *res integra*. A Constitution Bench of this Court, in *Ramchandra Shankar Deodhar v. State of Maharashtra* [(1974) 1 SCC 317 : 1974 SCC (L&S) 137] considered the effect of delay in challenging the promotion and

⁷ (1998) 2 SCC 523

⁸ (2010) 12 SCC 471

seniority list and held that any claim for seniority at a belated stage should be rejected inasmuch as it seeks to disturb the vested rights of other persons regarding seniority, rank and promotion which have accrued to them during the intervening period. A party should approach the court just after accrual of the cause of complaint. While deciding the said case, this Court placed reliance upon its earlier judgments, particularly in *Tilokchand Motichand v. H.B. Munshi* [(1969) 1 SCC 110] , wherein it has been observed that the principle on which the court proceeds in refusing relief to the petitioner on the ground of laches or delay, is that the rights, which have accrued to others by reason of delay in filing the writ petition should not be allowed to be disturbed unless there is a reasonable explanation for delay. The Court further observed as under: (*Tilokchand case* [(1969) 1 SCC 110] , SCC p. 115, para 7)

“7. ... The party claiming fundamental rights must move the Court before other rights come into existence. The action of courts cannot harm innocent parties if their rights emerge by reason of delay on the part of the person moving the Court.”

.....

29. It is settled law that fence-sitters cannot be allowed to raise the dispute or challenge the validity of the order after its conclusion. **No party can claim the relief as a matter of right as one of the grounds for refusing relief is that the person approaching the court is guilty of delay and the laches.** The court exercising public law jurisdiction does not encourage agitation of stale claims where the right of third parties crystallises in the interregnum. (Vide *Aflatoon v. Lt. Governor of Delhi* [(1975) 4 SCC 285 : AIR 1974 SC 2077] ; *State of Mysore v. V.K. Kangan* [(1976) 2 SCC 895 : AIR 1975 SC 2190] ; *Municipal Council, Ahmednagar v. Shah Hyder Beig* [(2000) 2 SCC 48] ; *Inderjit Gupta v. Union of India* [(2001) 6 SCC 637 : 2001 SCC (L&S) 1083] ; *Shiv Dass v. Union of India* [(2007) 9 SCC 274 : (2007) 2 SCC (L&S) 395] ; *A.P. SRTC v. N. Satyanarayana* [(2008) 1 SCC 210 : (2008) 1 SCC (L&S) 161] and *City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwalla* [(2009) 1 SCC 168]).

30. Thus, in view of the above, the settled legal proposition that emerges is that once the seniority had been fixed and it remains in existence for a reasonable period, any challenge to the same should not be entertained. In *K.R. Mudgal*, this Court has laid down, in crystal clear words that a seniority list which remains in existence for 3 to 4 years unchallenged, should not be disturbed. Thus, **3-4 years is a reasonable period for challenging the seniority and in case someone agitates the issue of seniority beyond this period, he has to explain the delay and laches in approaching the adjudicatory forum, by furnishing satisfactory explanation.**” (emphasis supplied)

12. A person who intends to assert his right must be diligent in prosecuting the litigation. Writ Court do not come to the rescue of a person not

diligent in prosecuting legal remedy, even if there is merit in the claim of petitioner and that he was wrongly ignored when junior was promoted. Furthermore, because of long delay rights may have accrued to others and if relief claimed in this writ petition is granted, settled issue for more than 40 years gets affected. Further, the State would have to be mulcted with financial liability to pay higher financial benefits. It is not in the interest of justice, public interest and fair play to grant relief on a stale claim.

13. In **M.R. Gupta**, the issue considered by Supreme Court was regarding fixation of initial pay. Supreme Court held not fixing pay is a continuous wrong, question of limitation does not arise. The appellant therein joined the service of Indian Railways in 1978, he claimed that on appointment in Indian Railways, his pay fixation was wrongly made. His application was rejected, Original Application filed before Central Administrative Tribunal was dismissed on the ground of delay. Supreme Court reversed the decision of the Tribunal.

14.1 In **S.R. Bhanrale**, Supreme Court observed that amounts due to appellant were wrongly withheld and therefore the plea taken by Union of India on bar of limitation against such claim was improper. It is appropriate to note that Supreme Court observed *"It is not as if the appellant had woken up after a decade to claim his dues. He had been asking the department to pay him his dues both while in service and after superannuation also but to no avail. In these circumstances, it ill behoved the Union of India to plead bar of limitation against the dues of the appellant."*

14.2. It is thus seen that the decision on **S.R.Bhanrale** is with reference to payment of arrears of amounts due to the employee and settlement of retirement benefits.

15.1. In **M. Vijaya Bhaskara Reddy**, this Court was considering the claim of correction of date of birth. The Court noticed that employee was

making the representations for change of date of birth for last 22 years by placing reliance on unprecedented evidence, cannot be rejected and gave directions. In paragraph 19 therein the Supreme Court summarised principles on correction of date of birth. Paragraph 19.3 reads as under:

“19 (3) Even if there is no period of limitation prescribed for seeking correction of date of birth, the Government servant must do so without any unreasonable delay and if a Government servant approaches the employer at a belated stage or at the fag end of the service, the general principle of refusing relief on grounds of laches or stale claims is generally applied by the Courts and the Tribunals as could be discerned from the judgments in K. Sitadevi's case (supra), Harnam Singh (supra), Bum Standard Company Limited case (supra), Visakhapatnam Dock Labour Board (supra) and C.Rama Swamy's case (supra).”

15.2. As seen from paragraph 20, this Court found certain distinguishing features in the said case to accept the plea of correction of date of birth, rejecting the contention of limitation.

16. It is thus seen that all three judgments relied on by learned counsel for petitioner are based on facts of those cases, do not deal with claims on seniority. On the contrary the two decisions of Supreme Court referred to in earlier paragraphs directly deal with stale claims on seniority in the service. Thus, the decisions relied by learned counsel for petitioner are of no avail to the petitioner.

17. Even according to petitioner, his juniors were promoted as UDA in July 1977; he made representation on 31.8.1977 against said promotions and further representation on 22.7.1988 to the Director of Treasuries and Accounts; The Director of Treasuries and Accounts rejected the representation on 21.4.1989. He claimed to have filed appeal on 27.8.1991 and 18.5.1995 and claimed to have made further representation on 1.8.1992. Copies of acknowledgments are not filed. This also would show petitioner was aware of his grievance and espoused before competent authority. However, no reasons forthcoming as to why he kept quiet for this long in availing remedy of judicial

review. More so, in the meantime he was promoted twice. His so-called juniors may have earned further promotions.

18. Petitioner now claiming notional seniority on par with his junior, i.e., after 40 years. There cannot be notional seniority unless retrospective promotion is granted. Further, Sri V.C. Johnson and others, who according to petitioner are juniors, are not made parties, whereas grievance is, those persons were promoted ignoring petitioner. Even if petitioner claim is held valid, he cannot be granted promotion unless promotions granted to Mr Johnson and others are declared illegal. There cannot be two promotions against one vacancy. Thus, Mr. Johnson and others are necessary and proper parties. At this distance of time Government can not be asked to create supernumerary post retrospectively dating back to 1977. Further, no material is placed on record to show that said persons were treated as juniors in the lower cadre.

19. Even from the reading of averments made in the affidavit filed in support of the writ petition, it is seen that claim of petitioner for fixation of notional seniority was rejected vide proceedings dated 21.4.1989 by the Director of Treasuries and Accounts/second respondent. Even assuming entertaining such application by the HOD was valid after long time, he claims to have preferred appeal to the Government on 27.8.1991, i.e., two years after rejection. Further, status of appeal is not disclosed.

20. By the time of his promotion, A.P. Administrative Tribunal was constituted under Article 371-D of the Constitution of India. This was replaced by new Tribunal under the Administrative Tribunals Act, 1985. Provisions constituting both Tribunals prescribed limitation to invoke their jurisdiction. Admittedly, no case was filed within the period of limitation and right vested to avail judicial remedy was extinguished long ago. Merely because, the Tribunal is abolished and under Article 226 of the Constitution of India, no limitation is

prescribed, petitioner cannot seek to resurrect cause, assuming there is a valid grievance. Even if the Government entertains his belated representations, not supported by any statutory provision, cannot resurrect such cause.

21. From the correspondence emanated from the Government and heavily relied on by the learned counsel, it appears that based on the representation made by petitioner on 29.12.2013, information was called from subordinate authorities. Under what provision of law such a representation can be entertained is not shown, except contending that proviso appended to Rule 17 of Ministerial Service Rules enables government to exercise such power at any time. Assuming such power is available in a case of this nature, it is settled principle of law that even if time limit is not prescribed to exercise power revision/review, the competent authority must exercise such power within reasonable time. By 2013 it was more than 34 years and thus it cannot be said as reasonable time.

22. In **Abdul Refeeq & Others Vs State Of Telangana & Others**⁹ on review of precedent decisions on what is reasonable time to entertain an application for review/ revision even if concerned provision vesting power to entertain review/ revisions do not prescribe any time limit, this Court held as under:

18. From the long line of precedent decisions, it is manifest that though Constitutional Courts have conceded revision power *per se* but were concerned about manner of exercise of such power in individual cases. Courts expressed displeasure in invoking such power after long lapse of time and upsetting settled issues. Therefore, courts have laid down limits to exercising such power. Courts have held that even in the absence of fixing time limit such power ought to be exercised within 'reasonable time'. However, what is reasonable time is left to be decided in individual cases.

22.1. In **B.S. Bajwa and Shiba Shankar Mohapatra**, Supreme Court held that four years is a reasonable time within which challenge on seniority can be agitated. However, in the case on hand, four years is also not

⁹ 2018(1) ALD 385

sacrosanct. Ministerial Service Rules and State and Subordinate Service Rules prescribe limitation to prefer appeal against promotion/ effecting conditions of service. Further, Administrative Tribunals Act, 1985 prescribed one year period of limitation to avail judicial remedy. The period of limitation is intended to ensure finality to decisions on service matters and to give quietus to litigation. Further, in service matters the grievance, more so one relating to promotion and seniority is not confined to individual and will have impact on several others. Thus, issue of limitation is pertinent in considering a claim of this nature.

23. The contention of learned counsel for petitioner on scope of power of revision by Government is also stated to be rejected.

23.1 Firstly, when so called junior was promoted in the year 1977, A.P. Ministerial Services Rules, 1966 were in force, whereas learned counsel for petitioner vehemently contended that as per Rule 17 of A.P. Ministerial Service Rules, 1998 power is vested in Government to revise/ review orders of promotion at any time. 1966 Rules did not envisage same power on the Government. Petitioner cannot refer to subsequent Rules made after 11 years to hold Government has power to revise/ review at any time. However, in the absence of contrary provision in 1966 Rules, A.P. State and Subordinate Service Rules are applicable. At that time 1962 Rules were in force. Rule 35 vests power of revision, without third proviso, as contemplated in Rule 17 of 1998 Rules. As per first proviso exercise of power of revision is for special and sufficient reasons to be recorded. Nothing is placed on record to show special and sufficient reasons to exercise such power.

23.2 Secondly, when Rule prescribes a limit of six months, exercise of such power after expiry of six months must be in extraordinary circumstances, but not as a matter of routine. More so, it cannot be exercised after 36 years.

23.3. Thirdly, even when such power is exercised, no decision can be made without notice to affected party. Apparently, no notice is issued.

23.4 Fourthly, Rules 35 and 36 of 1962 Rules and Rule 17 of 1998 Rules only vest power to revise/ review order of promotions/ list of approved candidates for promotion and no power is vested to revise/ review claim of notional seniority, whereas, petitioner claims notional seniority on par with alleged juniors. Notional promotion cannot be granted unless earlier promotion granted to junior is reviewed.

23.5. Lastly, no provision is brought to the notice of this Court tracing power of Government to consider his representation after 36 years, even if 2013 representation is the basis, which is referred in Government correspondence.

24. Having regard to the facts of this case, the claim to notional seniority is stale. The writ petition is hit by delay and laches and is liable to be dismissed. It is accordingly dismissed with costs of Rs. 10,000. The costs shall be deposited within 4 weeks from the date of receipt of the copy of this order with the Secretary, High Court Legal Service Authority. Pending Miscellaneous Petitions are closed.

P NAVEEN RAO,J

DATE: 23-08-2018

TVK

Note : L.R Copy to be marked—YES / NO

HONOURABLE SRI JUSTICE P. NAVEEN RAO



WRIT PETITION No. 27397 of 2018

Date : 23.8.2018