

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.838 of 2018

In
Civil Writ Jurisdiction Case No.1545 of 2015

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Akhtar Jamil, S/o Nehal Ahmad @ Nesar Ahmad, Resident of 4A, Royal Elegance Apartment, Ashiana Road, P.S.- Shastrinagar, District - Patna.

... .. Appellant

Versus

1. The State of Bihar.
2. The Secretary, Bihar Public Senior Commission, Patna.
3. The Principal Secretary, Water Resources Department, Govt. of Bihar, Patna.
4. The Joint Secretary, Water Resources Department, Govt. of Bihar, Patna.
5. The Additional Secretary, Water Resources Department, Govt. of Bihar, Patna.
6. The Under Secretary, Water Resources Department, Govt. of Bihar, Patna.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Syed Firoz Raza, Advocate
For the Respondent/s : Mr. A.P.P.

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE PURNENDU SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE P. B. BAJANTHRI)

Date : 14-11-2022

In the instant L.P.A., the appellant has questioned the order of the learned Single Judge dated 02.05.2018 passed in C.W.J.C. No. 1545 of 2015.

2. The grievance of the appellant is that he is aggrieved by the final gradation list of Assistant Engineers (Civil) notified by the Water Resources Department. Against the final gradation list dated 03.01.2008 C.W.J.C. No. 1545 of 2015 was presented in the year 2015. The learned Single Judge has



taken note of delay and third party right has accrued, therefore, C.W.J.C. was rejected.

3. Learned counsel for the appellant, vehemently, contended that delay would not be hurdle in questioning the final gradation list dated 03.01.2008. According to the learned counsel for the appellant, that his name should have reflected at Sl. No. 36 instead of Sl. No. 43. It is error committed by the author of the final gradation list dated 03.01.2008, if the same is not rectified, appellant's service condition would be affected severely.

4. Heard the learned counsel for the appellant.

5. Undisputed facts are that the appellant has questioned the validity of the gradation list dated 03.01.2008 final gradation list of Assistant Engineers (Civil) dated 03.01.2008 in the year 2015. Apex Court in the case ***Sadasivaswamy Vs. State of Tamilnadu*** reported in ***A.I.R. 1974 SC 2271***, wherein it is held in respect of seniority/promotion the affected person must agitate before the Court of Law within a reasonable period of six months from the date of cause of action. The same has been reiterated by the Apex Court in the case of ***Vijay Kumar Kaul and Ors. v. Union of India*** reported in ***(2012) 7 SCC 610***. Further, recently in the case of ***Union of***



India and Others Vs. C. Girija and Others reported in (2019)

15 SCC 633, the Apex Court has held as under:

“15. There is no dispute between the parties that in the Notification dated 14.10.1999 inviting applications for filling up of 05 posts under 30% LDCE quota, 04 vacancies were shown as unreserved and 01 as reserved for SC. The applicant submitted an application for participation in the selection but she could not be included against 04 unreserved vacancies, she being a general category candidate. There were certain complaints with regard to selection under 70% quota, with regard to which certain investigations were going on, which could be finalized in 2007. Applicant for the first time submitted representation to General Manager, Southern Railways on 25.09.2007 praying for inclusion of her name in the panel dated 09.01.2001. Copy of the representation filed by the applicant has been brought on the record, which indicate that applicant has in her representation relied on certain orders issued on 20.06.2007 and 05.09.2007 with regard to revision of the panel under 70% selection quota. With regard to 30% quota to be filled through LDCE, she stated that reserving 01 post for SC was totally against all norms. Representation was replied by Railways on 27.12.2007 stating that with regard to revision of the panel under 70% promotion quota, the applicant is not a party in any way. With regard to vacancy under 30% LDCE selection, it was indicated that the same was done as per the Rules prevalent at that time. O.A. No. 466 of 2009 was filed thereafter by the applicant, which has been decided by the Tribunal. The Tribunal condoned the delay of 560 days in filing the O.A. The applicant has challenged the communication dated 27.12.2007 of the Railways which was given in reply to the representation of the applicant. The condonation of delay, thus, only meant that against the letter dated 27.12.2007, her O.A. was held to be within time. The Tribunal and High Court have not adverted to the delay, which accrued from the declaration of panel on 09.01.2001 and submitting her representation on 25.09.2007, i.e. after more than 06 years and 09 months.

16. This Court had occasion to consider the question of



cause of action in reference to grievances pertaining to service matters. This Court in C.Jacob Vs. Director of Geology and Mining had occasion to consider the case where an employee was terminated and after decades, he filed a representation, which was decided. After decision of the representation, he filed an O.A. in the Tribunal, which was entertained and order was passed. In the above context, in paragraph No.9, following has been held:-

“9. The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly, they assume that a mere direction to consider and dispose of the representation does not involve any “decision” on rights and obligations of parties. Little do they realise the consequences of such a direction to “consider”. If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to “consider”. If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored.”

17. This Court again in Union of India and Others Vs. M.K. Sarkar, on belated representation laid down following, which is extracted below: (SCC p. 66, para 15)

“15. When a belated representation in regard to a “stale” or “dead” issue/dispute is considered and decided, in compliance with a direction by the



court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the “dead” issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court’s direction. Neither a court’s direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches.”

18. Again, this Court in *State of Uttaranchal Vs. Shiv Charan Singh Bhandari* had occasion to consider question of delay in challenging the promotion. The Court further held that representations relating to a stale claim or dead grievance does not give rise to a fresh cause of action. In paras 19 and 23 following was laid down: (SCC pp. 184-85)

“19. From the aforesaid authorities it is clear as crystal that even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. The dead cause of action cannot rise like a phoenix. Similarly, a mere submission of representation to the competent authority does not arrest time.

23. In *State of T.N. v. Seshachalam*, this Court, testing the equality clause on the bedrock of delay and laches pertaining to grant of service benefit, has ruled thus: (SCC p. 145, para 16)

“16. ... filing of representations alone would not save the period of limitation. Delay or laches is a relevant factor for a court of law to determine the question as to whether the claim made by an applicant deserves consideration. Delay and/or laches on the part of a government servant may deprive him of the



benefit which had been given to others. Article 14 of the Constitution of India would not, in a situation of that nature, be attracted as it is well known that law leans in favour of those who are alert and vigilant.”

19. This Court referring to an earlier judgment in *P.S. Sadasivaswamy Vs. State of Tamil Nadu*, noticed that a person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. In Paragraph No. 26 and 28, following was laid down:

(Shiv Charan Singh Bhandari case, SCC pp. 185-86)

“26. Presently, sitting in a time machine, we may refer to a two-Judge Bench decision in *P.S. Sadasivaswamy v. State of T.N.*, wherein it has been laid down that: (SCC p. 154, para 2)

“2. ... A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the courts to exercise their powers under Article 226 nor is it that there can never be a case where the courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters.”

28. Remaining oblivious to the factum of delay and laches and granting relief is contrary to all settled principles and even would not remotely attract the concept of discretion. We may hasten to add that the same may not be applicable in all circumstances where certain categories of fundamental rights are



infringed. But, a stale claim of getting promotional benefits definitely should not have been entertained by the Tribunal and accepted by the High Court.”

20. On the preposition as noticed above, it is clear that the claim of the applicant for inclusion of her name in the panel, which was issued on 09.01.2001 and for the first time was raked up by her, by filing representation on 25.09.2007, i.e., after more than 06 and half years. The claim of inclusion in the panel had become stale by that time and filing of representation will not give any fresh cause of action. Thus, mere fact that representation was replied by Railways on 27.12.2007, a stale claim shall not become a live claim. Both the Tribunal and the High Court did not advert to this important aspect of the matter. It is further to be noted from the material on record that after declaration of panel on 09.01.2001, there were further selection under 30% promotion by LDCE quota, in which the applicant participated. In selection held in 2005 she participated and was declared unsuccessful. With regard to her non-inclusion in panel in 2005 selection, she also filed O.A. No. 629 of 2006 before the Tribunal, which was dismissed. After participating in subsequent selections under 30% quota and being declared unsuccessful, by mere filing representation on 27.09.2007 with regard to selection made in 2001, the delay and laches shall not be wiped out.

21. There is one more aspect of the matter, which need to be noted. The applicant was well aware that under 30% LDCE quota, out of 05 vacancies, 04 are unreserved and 01 is reserved, which was circulated by notification dated 14.10.1999. She applied against the said bifurcated vacancies and was interviewed on 08.01.2001, panel of which was declared on 09.01.2001 and promotion was made on the same day. She having participated in the selection for promotion under 30% LDCE quota and the bifurcation of the vacancies being part of the process of selection, it was not open for her to challenge the bifurcation of vacancies into general and reserved after taking a chance to get selected. In this context, reference is made to judgment of this Court in *Ashok Kumar v. State of Bihar*. This Court after referring to several earlier judgments have laid down



following in Paragraph Nos. 13 to 18: SCC pp. 363-64)

“13. The law on the subject has been crystallised in several decisions of this Court. In *Chandra Prakash Tiwari v. Shakuntala Shukla*, this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In *Union of India v. S. Vinodh Kumar*, this Court held that: (SCC p. 107, para 18)

“18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. (See *Munindra Kumar v. Rajiv Govil* and *Rashmi Mishra v. M.P. Public Service Commission*.”

14. The same view was reiterated in *Amlan Jyoti Borooah*, wherein it was held to be well settled that the candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.

15. In *Manish Kumar Shahi v. State of Bihar*, the same principle was reiterated in the following observations: (SCC p. 584, para 16)

“16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner’s name had appeared in the merit list, he would not have



even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the judgments in *Madan Lal v. State of J&K*, *Marripati Nagaraja v. State of A.P.*, *Dhananjay Malik v. State of Uttaranchal*, *Amlan Jyoti Borooah v. State of Assam*, and *K.A. Nagamani v. Indian Airlines*.

16. In *Vijendra Kumar Verma v. Public Service Commission*, candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations. The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible.

17. In *Ramesh Chandra Shah v. Anil Joshi*, candidates who were competing for the post of Physiotherapist in the State of Uttarakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that: (SCC p. 318, para 18)

“18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.”

18. In *State (UT of Chandigarh) v. Jasmine Kaur*, it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn



around and complain that the process of selection was unfair after knowing of his or her non- selection. In *Pradeep Kumar Rai v. Dinesh Kumar Pandey*, this Court held that: (SCC p. 500, para 17)

“17. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. Thus, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted.”

This principle has been reiterated in a recent judgment in *Madras Institute of Development Studies v. K. Sivasubramaniyan*.”

22. We, thus, due to the above both the reasons, are of the view that the Tribunal and the High Court ought not to have entertained the stale claim of the applicant.”

6. Moreover, grievance of the appellant is that he is entitled to be assigned at Sl. No.36 instead of Sl. No. 43 in the final gradation list of Assistant Engineers (Civil) dated 03.01.2008. In the event of placing the appellant at Sl. No.36 some of the persons rights would be affected & they are not arrayed as party even on the ground of non-impleading proper and necessary parties, C.W.J.C. No. 1545 of 2015 is liable to be



rejected.

7. In view of these facts and circumstances, no interference is called for insofar as the order of the learned Single Judge dated 02.05.2018 passed in C.W.J.C. No.1545 of 2015.

8. Accordingly, the appeal stands dismissed.

(P. B. Bajanthri, J)

(Purnendu Singh, J)

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