

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A No. 111/2011

Thursday, this the 24th day of November, 2011.

CORAM

HON'BLE Dr K.B.S.RAJAN, JUDICIAL MEMBER

M.M.Hamsakoya,
(Headmaster – retired from Govt. High School, Androth)
Residing at Moolapura House,
Androth Island, Union Territory of Lakshadweep,
PIN: 682 551.Applicant

(By Advocate Mr M.V.Thampan)

v.

1. The Administrator,
Union Territory of Lakshadweep,
Kavaratti-682 555.
2. The Director,
Directorate of Education,
Union Territory of Lakshadweep,
Kavaratti-682 555.Respondents

(By Advocate Mr S Radhakrishnan)

This application having been finally heard on 22.11.2011, the Tribunal on 24.11.2011 delivered the following:

ORDER

HON'BLE Dr K.B.S.RAJAN, JUDICIAL MEMBER

The applicant initially joined the services of the respondents in 1974 as a Trained Graduate teacher and later on was promoted as Headmaster w.e.f. 30-03-1994. The terms of promotion included that the same was purely temporary and on ad hoc basis and that the same would not confer on him any claim for regular appointment to the post or seniority, confirmation etc., in the grade.

Order dated 28-03-1994 refers.



2. The applicant superannuated in 2008 in the said post of Headmaster. In 2010, on finding that he was entitled to consideration for Senior Scale after completing 12 years of service as Headmaster, he made a representation to the authorities vide Annexure A-1. In quick succession, vide Annexure A-2 representation dated 21.10.2010, he has again requested the authorities for consideration of his case. As there was no response, Annexure A-3 letter dated 1.12.2010 was also sent. However, there was no response and hence this O.A has been filed seeking the following relief:

To direct the 1st respondent to consider and pass orders on Annexures A-1, A-2 and A-3 within a time frame to be fixed by this Tribunal.

3. Respondents have contested the O.A. They have raised the preliminary objection of delay and laches relying upon the judgment of the Apex court in **Union of India & others v. M.K.Sarkar** [(2010) 2 SCC 59]. As regards the merits of the case, their contention is that the applicant's initial posting was on ad hoc basis in 1994 which continued by way of extension. It has only from the date of convening DPC in October, 2003 that the applicant was appointed as Headmaster, Government High School, Androth on regular basis. According to the respondents, ad hoc promotion was to continue as there was no regular vacancy. Entitlement to senior scale is available only to those who have put in 12 years of regular service and the applicant has not completed 12 years of regular service in the post of Headmaster. As such, he is not entitled to any senior scale.

4. Applicant has filed his rejoinder contending that his regularization was delayed for years and the same is violative of various judgments. He has relied upon a decision of this Tribunal in O.A.No.101/1990 decided on 22.3.1991.

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5. As regards limitation, in his rejoinder, the applicant has contended that there being recurring cause of action, the decision of the Apex Court in the case of **Union of India & others v. M.K.Sarkar** relied upon by the respondents is not applicable to the facts of the case of applicant.

6. Counsel for the applicant argued that the applicant's initial promotion as Headmaster was as per order dated 28.3.1994 (Annexure R-2). He continued in the post uninterruptedly and his case was regularised in 2003 and he retired in 2008. His entitlement to senior scale is on his completing 12 years of service from 1994 onwards and thus from April 2006, the applicant is entitled to the senior scale. The applicant is not responsible for his ad hoc services not being regularised and the case of **P.N.Premachandran (supra)** comes to the rescue of the applicant.

7. Counsel for the respondents on the other hand heavily relied upon the limitation and also submitted that for senior scale, 12 years of regular is required.

8. Arguments were heard and documents perused. Admittedly, the applicant was promoted as Headmaster vide order dated 28.3.1994. This was on ad hoc basis for six months. According to the respondents, ad hoc promotion was resorted to as there was no vacancy available. However, the first para of order dated 28-03-1994 reads as under:-

"The Administrator, Union Territory of Lakshadweep, in exercise of the powers delegated in part II of the Schedule to the CCS(CCA), Rules, 1965 is pleased to promote Shri M.M. Hamzakoya, Headmaster, Govt. S.B. School, Andrott, as Headmaster, Govt. High School on ad hoc basis initially for six months, against the existing vacancy on pay scale of Rs 2000 - 60-2300-75- 2375-EB-75-2825-EB-3200-100-3300-EB-100-3500 (General Central Service - Group 'B' Gazetted - Non ministerial) and posted at Govt. High School, Kiltan. He shall take over charge of Headmaster from the Asst. Headmaster, Govt. High School,

Killan before 31-03-1994." (Emphasis supplied)

9. In their counter, respondents have averred that the ad hoc promotion was made in the deputation vacancy of a Headmaster to the post of Education Officer, vide para 8 of the counter. It is also stated in the said paragraph that the applicant who was promoted as Headmaster on ad hoc basis for six months by order dated 28-03-1994 and the applicant continued to get extension. The DPC was convened on 16-10-2003 and the applicant was appointed as Headmaster, Gov. High School Andrott on regular basis in the Pay scale of Rs 7,500 – 250-12000 (Group B Gazetted) w.e.f. the date of DPC. In other words, as per the respondents themselves, the applicant had been accommodated against the deputation vacancy and the same continued from March, 1994 to October 2003 i.e. for 9 years and six months. The question is whether this ad hoc service, for such a continuous period against a vacancy available due to deputation of a Headmaster to the post of Education Officer, be treated as ad hoc for such a long period of nearly a decade.

10. In so far as ad hoc nature of promotion, generally ad hoc promotions are resorted to to meet certain emergent administrative requirements and the vacancy is fortuitous. The period of fortuitous vacancy may be short or long. Promotion made against a vacancy meant for direct recruitment is also an ad hoc arrangement and the same does not crystallize into regular if the period of ad hoc promotion is for a substantial period (See **Keshav Chandra Joshi vs Union of India (1992) Supp 2 SCC 272**). But when the vacancy has to be filled up only by promotion and when the person so promoted against such vacancy has no other senior to him for promotion, and when such promotion is followed by regular promotion, the question that arises for consideration is whether the period of such an ad hoc promotion could be counted for any particular purpose such as seniority, or experience for higher promotion or to count the same for

ascertaining the eligibility for senior scale, as in this case.

11. The Apex Court in the case of **Rudra Kumar Sain vs Union of India (2000) 8 SCC 25** had the occasion to analyze threadbare the terminology "ad hoc" and its associates such as "stop gap" or "fortuitous" and held as under:-

"15. So far as the terminology used in *Singla* case, namely "ad hoc", "fortuitous" and "stopgap", the same is quite familiar in the service jurisprudence. Mr Rao, appearing for the High Court of Delhi however contended before us that the said terminology should be given the same meaning, as was given in *Parshotam Lal Dhingra v. Union of India*. In *Dhingra* case the Court was examining whether removal of an employee can be held to be penal and whether Article 311(2) of the Constitution can at all be attracted and the Court also observed that certain amount of confusion arises because of the indiscriminate use of the words "provisional", "officiating" and "on probation". We do not think that the concept or meaning given to those terminology in *Dhingra* case will have any application to the case in hand, where the Court is trying to work-out an equitable remedy in a manner which will not disentitle an appointee, the benefit of his fairly long period of service for the purpose of seniority, even though he possesses the requisite qualification and even though his appointment has been made after due consultation and/or approval of the High Court.

16. The three terms "ad hoc", "stopgap" and "fortuitous" are in frequent use in service jurisprudence. In the absence of definition of these terms in the Rules in question we have to look to the dictionary meaning of the words and the meaning commonly assigned to them in service matters. The meaning given to the expression "fortuitous" in *Stroud's Judicial Dictionary* is "accident or fortuitous casualty". This should obviously connote that if an appointment is made accidentally, because of a particular emergent situation and such appointment obviously would not continue for a fairly long period. But an appointment made either under Rule 16 or 17 of the Recruitment Rules, after due consultation with the High Court and the appointee possesses the prescribed qualification for such appointment provided in Rule 7 and continues as such for a fairly long period, then the same cannot be held to be "fortuitous". In *Black's Law Dictionary*, the expression "fortuitous" means "occurring by chance", "a fortuitous event may be highly unfortunate". It thus, indicates that it occurs only by chance or accident, which could not have been reasonably foreseen. The expression "ad hoc" in *Black's Law Dictionary*, means "something which is formed for a particular purpose". The expression "stopgap" as per *Oxford Dictionary*, means "a temporary way of dealing with a problem or satisfying a need".

17. In *Oxford Dictionary*, the word "ad hoc" means for a particular purpose; specially. In the same dictionary, the word "fortuitous" means happening by accident or chance rather than design.

18. In *P. Ramanatha Aiyar's Law Lexicon* (2nd Edn.) the word "ad hoc" is described as: "For particular purpose. Made, established, acting or concerned with a particular (sic) and or purpose." The meaning of word "fortuitous event" is given as "an event which happens by a cause which we cannot resist; one which is unforeseen and caused by superior force, which it is impossible to resist; a term synonymous with Act of God".

19. The meaning to be assigned to these terms while interpreting provisions of a service rule will depend on the provisions of that rule and the context in and the purpose for which the expressions are used. The meaning of any of these terms in the context of computation of inter se seniority of officers holding cadre post will depend on the facts and circumstances in which the appointment came to be made. For that purpose it will be necessary to look into the purpose for which the post was created and the nature of the appointment of the officer as stated in the appointment order. If the appointment order itself indicates that the post is created to meet a particular temporary contingency and for a period specified in the order, then the appointment to such a post can be aptly described as "ad hoc" or "stopgap". If a post is created to meet a situation which has suddenly arisen on account of happening of some event of a temporary nature then the appointment of such a post can aptly be described as "fortuitous" in nature. If an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to the post due to any reason and it is not possible to leave the post vacant till then, and to meet this contingency an appointment is made then it can appropriately be called as a "stopgap" arrangement and appointment in the post as "ad hoc" appointment. It is not possible to lay down any strait-jacket formula nor give an exhaustive list of circumstances and situation in which such an appointment (ad hoc, fortuitous or stopgap) can be made. As such, this discussion is not intended to enumerate the circumstances or situations in which appointments of officers can be said to come within the scope of any of these terms. It is only to indicate how the matter should be approached while dealing with the questions of inter se seniority of officers in the cadre.

20. In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc". In this view of the matter, the reasoning and basis on which the appointment of the promotees in the Delhi Higher Judicial Service in the case in hand was held by the High Court to be "fortuitous/ad hoc/stopgap" are wholly erroneous and, therefore, exclusion of those appointees to have their continuous length of service for seniority is erroneous."

Para 20 of the above judgment is in the nature of a judgment *in rem* as the Apex Court has utilized the term, "*In service jurisprudence*". The above law thus,

could be safely pressed into service in the instant case.

12. It is not the case of the respondents that there had been earlier DPCs held but the applicant could not be found suitable. Nor is it the case that his initial ad hoc promotion for six months is against a vacancy tenable by any other individual or the vacancy belongs to some other quota than promotion quota. If the vacancy against which the applicant was promoted in 1994 vide order dated 28-03-1994 [Annexure R 1(b)] is on account of the incumbent proceeding on deputation and is to be filled up only by promotion, then what is to be seen is whether such a vacancy could be treated as regular or only ad hoc. In this regard, the Apex Court in the case of **P.S. Mahal vs Union of India (1984) 4 SCC 545** has held as under:-

"It is significant to note that the view that deputation vacancies being long term vacancies should be regarded as permanent vacancies for the applicability of the quota rule prevailed with the Government of India as far back as October 19, 1971 long before the present controversy arose between the parties and even prior to the decisions in *Bishan Sarup Gupta* cases and *A.K. Subraman* case. We find that this view was reaffirmed by the Government of India in the Office Memorandum dated December 30, 1976 issued by the Department of Personnel and Administrative Reforms, Cabinet Secretariat where it has been stated as follows under the heading "Determination of Regular Vacancies":

"It is essential that the number of vacancies in respect of which a panel is to be prepared by a D.P.C. should be estimated as accurately as possible. For this purpose the vacancies to be taken into account should be the clear vacancies arising in post/grade/service due to death, retirement, resignation, regular long term promotion of incumbents of one post/grade to higher post/grade and vacancies arising from creation of additional posts on a long term basis and these arising out of deputation. As regards vacancies arising out of deputation it is clarified that for the purpose of drawing up a select list for promotion, vacancies arising out of deputation for periods more than one year should be taken into account, due note however being kept also of the number of the deputationists likely to return to the cadre and who have to be provided for. Purely short term vacancies arising as a result of officers proceeding on leave, on deputation for a shorter period, training etc., should not be taken into account for the purpose of

preparation of a panel."

Thus, the vacancy, admittedly, which became available by virtue of a person having gone on deputation, against which the applicant continued for nearly a decade cannot be branded as ad hoc under any scale or barometer. The applicant's services on ad hoc basis were followed without any break by regular promotion. His initial ad hoc promotion is not stated to have been *de hors* any rule. Even if in his initial promotion on ad hoc basis, if there were any procedural irregularity, the same becomes insignificant and the period of ad hoc service when followed by regular promotion has to be treated as regular only. Thus, the ruling of the Constitution Bench of the Apex Court in para 47 (b) of the **Direct Recruit Class II Engineering Officers' Association vs State of Maharashtra (1990) 2 SCC 715** readily applies to this case and the same is as under:-

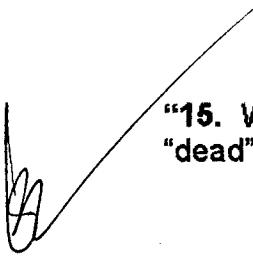
"47. To sum up, we hold that:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

13. The next question is whether the applicant had come belatedly to the Court. Respondents have relied upon the decision in the case of **Union of India vs M.K. Sarkar (2010) 2 SCC 59**, wherein the Apex Court has held as under:-

 "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.

16. A court or tribunal, before directing "consideration" of a claim or representation should examine whether the claim or representation is with reference to a "live" issue or whether it is with reference to a "dead" or "stale" issue. If it is with reference to a "dead" or "stale" issue or dispute, the court/tribunal should put an end to the matter and should not direct consideration or reconsideration. If the court or tribunal deciding to direct "consideration" without itself examining the merits, it should make it clear that such consideration will be without prejudice to any contention relating to limitation or delay and laches. Even if the court does not expressly say so, that would be the legal position and effect.

The applicant's claim is that his service should be counted for the purpose of calculating 12 years service for earning the senior scale. The said Rule does not any way reflect that that the period of twelve years should be "regular service." Order dated 12-08-1987 is one relating to revision of pay scales of School Teachers. It is trite that the same pay scale is admissible to regular as well as ad hoc teachers. Absence of the word "regular" with reference to 12 years of service has, presumably enabled the applicant to construe that he would be entitled to senior scale irrespective of his service of 12 years as regular or otherwise. There is no inkling that the same is only on regular service. Of course, there is a provision that such senior scale or selection grade scale would be made available subject to satisfactory performance by an appropriate DPC, vide condition No. 3(iii) of Annexure R 1(a). But that alone cannot mean that the period of 12 years should be regular service. Take for example, crossing of efficiency bar the same too would be available only after holding a kind of DPC and if there is no condition that for availing of normal increment after crossing EB, one should be holding the post on regular basis, the same would hold good

for senior scale as well. This period of 12 years of service was completed by the applicant in 2006 and the applicant superannuated in 2008. He could have made a representation either in 2006 or in 2008 but he chose to represent only in 2010. In his representation he has cited two examples of his seniors who had been afforded the senior scale. If this be correct then there is no reason as to why the applicant has been singled out. What the applicant claim is not regularization from 1994 in which case, there could be a question of delay but here what he claims is that for considering his case for grant of senior scale, period rendered on ad hoc basis should also be taken into account and if regular service is insisted, then also the applicant cannot be faulted with for belated regularization. Thus, the question of delay from 1994 does not arise and the delay is only from 2007 (one year after the period he had completed 12 years of service). But the cause of action is one of continuous cause of action. The Apex Court had considered as how to deal with the case of continued wrong or continuous cause of action in the case of *Union of India vs M.R. Gupta (1995) 5 SCC 628* as under:-

"The claim to be paid the correct salary computed on the basis of proper pay fixation, is a right which subsists during the entire tenure of service and can be exercised at the time of each payment of the salary when the employee is entitled to salary computed correctly in accordance with the rules. This right of a government servant to be paid the correct salary throughout his tenure according to computation made in accordance with the rules, is akin to the right of redemption which is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists, unless the equity of redemption is extinguished."

14. While holding so, the Apex Court has also held that in so far as drawal of arrears is concerned, limitation would apply. And in so far as arrears, the extent of arrears that would not be affected by the law of limitation is three years prior to the filing of the OA as held by the Apex Court in the case of *Jai Dev Gupta v. State of H.P., (1997) 11 SCC 13* wherein the Apex Court has held as under:-

"Learned counsel appearing for the appellant submitted that

before approaching the Tribunal the appellant was making a number of representations to the appropriate authorities claiming the relief and that was the reason for not approaching the Tribunal earlier than May 1989. We do not think that such an excuse can be advanced to claim the difference in back wages from the year 1971. In Administrator of Union Territory of Daman and Diu v. R.D. Valand this Court while setting aside an order of the Central Administrative Tribunal has observed that the Tribunal was not justified in putting the clock back by more than 15 years and the Tribunal fell into patent error in brushing aside the question of limitation by observing that the respondent has been making representations from time to time and as such the limitation would not come in his way. In the light of the above decision, we cannot entertain the arguments of the learned counsel for the appellant that the difference in back wages should be paid right from the year 1971. At the same time we do not think that the Tribunal was right in invoking Section 21 of the Administrative Tribunals Act for restricting the difference in back wages by one year.

3. In the facts and circumstances of the case, we hold that the appellant is entitled to get the difference in back wages from May 1986. The appeal is disposed of accordingly with no order as to costs."

15. In **Shiv Dass vs Union of India (2007) 9 SCC 274** it has been held:

"7. To summarize, 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 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 reopening 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 refixation 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. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequent relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition."

Thus, if the applicant succeeds, he gets the benefit of pay scale in the senior scale and in so far as arrears are concerned, the same shall be restricted to three years prior to his application. Any amount accrued prior to three years would not be available due to his delayed action. That is the penalty he has to

pay for his delay.

16. Yet another case of the Apex Court which would render support to the case of condonation of delay is **Union of India vs Tarsem Singh (2008) 8 SCC 648** wherein the Apex Court has held as under:-

"7. 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 reopening 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 refixation 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. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the 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. (emphasis supplied)

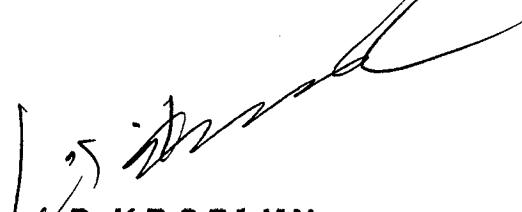
17. In the instant case, the claim of the applicant is restricted only to fixation of pay scale in the senior scale and the same does not in any way affect the interest of any others. Again, the applicant has already superannuated and thus, any relief given to him would not affect the interest of any one else. His claim for seniority is however, rejected.

18. In view of the above, the OA is allowed. It is declared that the period of service rendered by the applicant since 1994 as Headmaster would count for working out the period of 12 years of service for the purpose of consideration for grant of senior scale to the applicant as provided for in the order dated

12.08.1987. Provisions contained in para 3(iii) would however, be kept in view while so considering the case of the applicant. In view of the peculiar circumstances of the case (consideration for senior scale after superannuation), the competent authority shall consider grant of exemption in respect of training as stipulated in para 3(iv) thereof. If the applicant is found suitable for placement in the senior scale, the same would be notional from the date he completed 12 years of service reckoned from his initial date of promotion to the post of Headmaster vide order dated 28-03-1994 i.e. from April, 2006 and actual from February, 2008 (three years prior to his filing this OA which was filed in February, 2011). Thus, his last pay drawn should be worked out on the basis of such fixation of pay and the same shall constitute the basis for working out his pension and other terminal benefits. As the applicant has filed this OA in February, 2011, arrears of pay and allowances from February, 2008 and pension based on higher pay from the date of his retirement from service, i.e. 01-07-2008 would be available. Suitable orders be passed in this regard after holding the appropriate DPC as stated above. The entire drill including payment of arrears of pay and pension and payment of revised pension worked out on the basis of the senior scale of pay, (subject to the applicant being held suitable) shall be completed within a period of six months from the date of communication of this order.

19. Under the circumstances, there shall be no orders as to cost.

Dated, the 24th November, 2011.



Dr K.B.S.RAJAN
JUDICIAL MEMBER