# Central Administrative Tribunal
# Principal Bench, New Delhi

O.A. No.3117/2013
M.A.No.2375/2013

Order reserved on 26th August 2015

Order pronounced on 1st September 2015

**Hon'ble Mr. A.K. Bhardwaj, Member (J)**
**Hon'ble Mr. K.N. Shrivastava, Member (A)**

Mr. Mukesh Kumar Verma
(Occupational Therapist, Retd.)
s/o Mr. Madan Lal Verma
r/o 340, Lake View Apartments
Sector 9, Rohini
Delhi-85

..Applicant

(Dr. K.C. Rakesh, Advocate)

Versus

1. Director General of Health Services
   Govt. of India, Nirman Bhawan
   New Delhi

2. Medical Superintendent
   Safdarjang Hospital
   New Delhi

3. Ministry of Health & Family Welfare
   Govt. of India, Nirman Bhawan
   New Delhi (through its Secretary)

4. Secretary
   Govt. of India
   Ministry of Personnel
   Public Grievances & Pensions
   (Deptt. of Personnel & Training)
   New Delhi

5. Union Public Service Commission
   (through its Chairman)
   Dhol Pur House,
   Shahjahan Road, New Delhi

..Respondents

(Mr. D.S. Mahendru, Advocate)

**O R D E R**

**Mr. A.K. Bhardwaj:**

In the present Original Application filed under Section 19 of the Administrative Tribunals Act, 1985, the applicant has sought issuance of direction to the respondents to consider him for promotion to the post of Senior Occupational Therapist w.e.f. 1.6.2003 when the post fell vacant on account of voluntary retirement of Mrs. Sujata Malik.

2. Learned counsel for respondents raised a preliminary objection that the Original Application is barred by limitation and is liable to be rejected on this ground alone.

3. To meet the argument, learned counsel for applicant relied upon the judgment of Hon'ble High Court of Rajasthan in **Rajasthan State Electricity** v. **Sultan Mohd.** (2000) IIILLJ 691 Raj. and this Tribunal in **J.K. Ojha** v. **Union of India & another**, 2002 (3) SLJ (CAT) 1. According to him, refusal to grant relief under Article 226 of the Constitution on the ground of delay cannot be reconciled with the primary objects of enforcing any fundamental right conferred upon the parties or doing justice to the parties or enforcing the rule of law, because refusal to grant relief to the parties, who approach the Court for redressal of their grievance, would in all probability result in the deprivation of fundamental right or denial of justice or deterioration of rule of law. Paragraphs 40 and 53 of the judgment delivered in **Rajasthan State Electricity's** case (supra) read thus:-

> "40. Refusal, to grant relief under Article 226 of the Constitution on the ground of delay, cannot be reconciled with the primary objects of

enforcing any fundamental right conferred by Part in or doing justice to the parties or enforcing the rule of law, because refusal to grant relief to the parties who approach the Court for redressal of their grievance, would in all probability result in the deprivation of fundamental right or denial of justice or deterioration of rule of law, if the allegations made in the petition are correct. The question is, what are the reasons which may justify the Court to refuse to grant relief under Article 226 of the Constitution on the ground of delay if otherwise the petitioner is entitled, to such relief? We are aware of the provisions of Limitation Act, 1963 which prescribes the period for several acts including the filing of the petitions in the Court. The reasons for prescribing the period of limitation, in Rajendra Singh v. Santa Singh: AIR 1973 SC 2537, their Lordships of the Hon'ble Supreme Court observed :

> "The object of the Law of Limitation is to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by party's own inaction, negligence or laches."

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53. One of the objects for which constitutional power has been conferred under Article 226 of the Constitution is to enforce the fundamental right by issuance of an order, direction or a writ as envisaged by Article 226 of the Constitution. The fundamental rights conferred by Part III of the Constitution, clearly indicate by the words used by the founding fathers of the Constitution that it is more, the duty of the rest of the society and the State rather than the duty of the individual citizen to protect his own rights which are described as fundamental rights. It has been repeatedly held in several cases that Hon'ble the Supreme Court and the High Courts are the custodians of the fundamental rights of the people and that it is their duty to ensure that the fundamental rights are not denied to any person. Any action which results in deprivation of the fundamental rights, is liable to be quashed on the ground of being violative of the fundamental rights conferred by Part III of the Constitution. Even the law enacted by the Legislature is liable to be declared as void under Article 13 of the Constitution if it contravenes any fundamental right conferred by Part III of the Constitution. The general rule, which is very obvious from the language used by the framers of the Constitution, in Part III of the Constitution, is that every person including the State and its organs, must take pains to ensure that the action does not in any manner deprive any person of his or her fundamental right because such action would be void ab initio and, would not be permissible. In Ram Narayan Singh v. State of Delhi: AIR 1953 SC 277 the Hon'ble Supreme Court in an unambiguous language laid down the law that "those who called upon to deprive other persons of their personal liberty in discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of law". The Hon'ble Supreme Court did not impose any duty on the citizens to assert and take necessary steps to enforce their fundamental rights if

there was any threat to such rights. We are, therefore, of the considered opinion, as a general rule, it is the duty of the State and its functionaries and the society to take pains to ensure that the action does not deprive any person or his or her fundamental right and to protect such person's fundamental rights even without his asking. No other view would be compatible with the doctrine of rule of law and the supremacy of the fundamental rights conferred by Part III of the Constitution."

4. We heard the learned counsels for the parties and perused the record.

5. Indubitably the applicant, who has already retired from service, filed the present Original Application on 6.9.2013 seeking promotion from 1.6.2003, i.e., the date when the post of Senior Occupational Therapist fell vacant. In view of the submissions put forth by the learned counsel for applicant, i.e., fundamental right cannot be defeated by delay and latches, first we need to see whether any employee can seek a writ of mandamus against the employer to fill up the post as soon as it fell vacant as his fundamental right. The answer can be found in the judgment of Hon'ble Supreme Court in **Union of India & others** v. **Majji Jangammayya & others**, AIR 1977 SC 757 wherein it could be held that the State can keep the post vacant as long as it wishes. The relevant excerpt of the said judgment reads thus:-

"58. The observations of this Court in Bishan Sarup Gupta's case (AIR 1972 SC 2627) (supra) are that if as a result of the fresh seniority list it is found that any officer was eligible for promotion to the post of assistant Commissioner on account of his place in the new seniority list, the department might have to consider his case for promotion on his record as on the date when he ought to have been considered and if he would be selected his position will be adjusted in the seniority list of Assistant Commissioners. The object is to see that the position of such a person is not affected in the seniority list of assistant Commissioners because he is actually promoted later pursuant to the new seniority list although according to the new seniority list itself he should have been promoted earlier. The observations do not mean that although the Committee can meet for the selection of officers for promotion to the post of Assistant Commissioner only after the

> seniority list is approved by this Court, the selection would be deemed to be made at the time when a vacancy in the post of Assistant Commissioner occurred and the eligibility of officers for selection will be determined by such deemed date of selection. No employee has any right to have a vacancy in the higher post filled as soon as the vacancy occurs. Government has the right to keep the vacancy unfilled as long as it chooses. In the present case, such a position does not arise because of the controversy between two groups of officers for these years. The seniority list which is the basis for the field of choice for promotion to the post of Assistant Commissioner was approved by this Court on 16 April, 1974. Promotions to the post of Assistant Commissioners are on the basis of the selection list prepared by the Committee and are to be made prospectively and not retrospectively."

In view of the aforementioned, no fundamental right can be said to be vested in applicant to force the Government to fill up the higher post as soon as it fell vacant.

5. Also in **Baij Nath Sharma** v. **Hon'ble Rajasthan High Court at Jodhpur & another**, 1988 SCC (L&S) 1754, the Hon'ble Supreme Court categorically viewed that no employee is vested with a right to promotion from the date of availability of vacancies. Paragraphs 8 & 9 of the judgment read thus:-

> "8. The appellant could certainly have a grievance if any of his juniors had been given promotion from a date prior to his superannuation. It is not the case here. From the promotional quota, four promotions were made only on 30.12.1996 i.e., after the appellant had retired. Those promoted were given promotions from the dates the orders of their promotions were issued and not from the dates the posts had fallen vacant. It is also the contention of the High Court that these four officers, who were promoted to RHJS, were senior to the appellant as per the seniority list. The question which falls for consideration is very narrow and that is if under the Rules applicable to the appellant promotion was to be given to him from the date the post fell vacant or from the date when order for promotion is made. We have not been shown any rule which could help the appellant. No officer in RJS has been promoted to RHJS prior to 31.05.1996 who is junior to the appellant. Further decision by Rajasthan High Court has been taken to restore the imbalance between the direct recruits and the promotees which, of course, as noted above, is beyond challenge.

9. In Union of India and Ors. v. KKVadera and Ors., AIR1990SC442 this Court with reference to Defence Research and Development Service Rules, 1970, held that promotion would be effective from the date of the order and not from the date when promotional posts were created. Rule 8 of those Rules did not specify any date from which the promotion would be effective. This Court said as under:-

> "There is no statutory provision that the promotion to the post of Scientist 'B' should take effect from 1st July of the year in which the promotion is granted. It may be that rightly, or wrongly, for some reason or the other, the promotions were granted from 1st July, but we do not find any justifying reason for the direction given by the Tribunal that the promotions of the respondents to the posts of Scientists 'B' should be with effect from the date of the creation of these promotional posts. **We do not know of any law or any rule under which a promotion is to be effective from the date of creation of the promotional post. After a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date on which such post falls vacant**. In the same way when additional posts are created, promotions to those posts can be granted only after the Assessment Board has met and made its recommendations for promotions being granted. If on the contrary, promotions are directed to become effective from the date of the creation of additional posts, then it would have the effect of giving promotions even before the Assessment Board has met and assessed the suitability of the candidates for promotion. In the circumstances, it is difficult to sustain the judgment of the Tribunal."
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> (emphasis supplied)

6. As far as the judgment of Hon'ble High Court of Rajasthan in **Rajasthan State Electricity** (supra) is concerned, in the said case, the technical workmen under the Rajasthan State Electricity Board raised demand for revising and fixing proper pay scale commensurating to their duties. Paragraph 5 of the judgment reads thus:-

> "5. It appears that the technical workmen under the Rajasthan State Electricity Board, hereinafter referred to as 'the Board', raised demand for revising and fixing proper pay scale commensurating to their duties. An agreement was entered into between the employees Union and the respondent Board by which the dispute was referred to two arbitrators viz; S/Shri Prithvi Singh and A.L. Sancheti in accordance with the provisions of Section 10-B(I) of the Industrial

Disputes Act, hereinafter referred to as 'the Act'. Following were the terms of reference:

"(1) To decide the principles to regulate fixation/ adjustment/promotion of all the technical workmen of the Rajasthan State Electricity Board in respect to the following periods:

(1) From April 1, 1968 to March 31, 1977, who have completed a continuous service of two years or more by March 31, 1977.

(ii) In respect of all the technical workmen from April 1, 1977 and onwards.

(2) To decide/frame the procedure/ regulations for recruitment and promotion of all technical workmen to come into force with effect from April 1, 1977."

7. Similarly in **J.K. Ojha's** case (supra), the issue involved was that the applicant, Mr. J K Ojha wanted to return back to IRTS and there was no issue of promotion involved in the said case also.

8. It is well settled law that judicial precedent cannot be followed as a statute and need to be applied with reference to the facts of the case involved in it. In **Collector of Central Excise, Calcutta v. M/s Alnoori Tobacco Products & another**, 2004 (6) SCALE 232, it has been held thus:

"12. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. V. Horton (1951 AC 737 at p.761), Lord Mac Dermot observed:

> "The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."

13. In Home Office v. Dorset Yacht Co. (1970 (2) All ER 294) Lord Reid said, "Lord Atkin's speech.....is not to be treated as if it was a statute definition It will require qualification in new circumstances." Megarry, J in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board (1972 (2) WLR 537) Lord Morris said:

> "There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

14. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

15. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

> "Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

9. As has been viewed by the Hon'ble Supreme Court in **B.S. Bajwa & another** v. **State of Punjab & others**, JT 1998 (1) SC 57, the question of seniority should not be reopened after the lapse of a reasonable period, as it results in disturbing the settled position, which is not justifiable. Paragraph 6 of the said judgment reads as under:

> "6. 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 latches because the grievance 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 order aforesaid persons and the rights inter se had crystalised which ought not to have been re-opened after the lapse of such a long period. At every stage the 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..."

10. Further, when the consideration for promotion can be claimed as a fundamental right, there is no fundamental right to get promotion. The consideration for promotion means the right to be considered when the Department take up the proposal to do so and not to force the Department to fill up the vacancies even when it chooses not to do so.

11. In his application for condonation of delay filed by the applicant, i.e., M.A.No.2375/2013, the only plea espoused is that only after decision in O.A. No.2480/2009 decided on 2.12.2010 the applicant could know that he can get promotion even after his retirement. As has been ruled by the Apex Court in **State of Karnataka & others** v. **S.M. Kotrayya & others** (1996) 6 SCC 267, the date of knowledge of a previous Order of Tribunal on the basis of which a claim can be founded cannot be an explanation acceptable to condone the delay. Paragraphs 8 and 9 of the said judgment read thus:-

> "8. The decision of the Constitution Bench in S.S. Rathore's case (supra) has no application to the facts in this case. Therein, this Court was concerned with the question whether the total period of six months covered under Sub-section (3) had to be excluded in filing the

petition in the suit, when it was transferred to the Tribunal under the Administrative Tribunal Order. In that behalf, the Constitution Bench held that a suit under a civil court's jurisdiction is governed by Article 58 of Limitation Act, 1963 and the claims for redressal of the grievances are governed by Article 21 of the Act. The question whether the Tribunal has power to condone the delay after the expiry of the period prescribed in Sub-sections (1) and (2) of Section 21, did not arise for consideration in that case.

9. Thus considered, we hold that it is not necessary that the respondents should give an explanation for the delay with occasioned for the period mentioned in Sub-sections (1) or (2) of Section 21, but they should give explanation for the delay which occasioned after the expiry of the aforesaid respective period applicable to the appropriate case and the Tribunal should be required to satisfy itself whether the explanation offered was proper explanation. In this case, the explanation offered was that they came to know of the relief granted by the Tribunal in August 1989 and that they filed the petition immediately thereafter. That is not a proper explanation at all. What was required of them to explain under Sub-sections (1) and (2) was as to why they could not avail of the remedy of redressal of their grievances before the expiry of the period prescribed under Sub-section (1) or (2). That was not the explanation given. Therefore, the Tribunal is wholly unjustified in condoning the delay."

12. In view of the aforementioned, M.A. for condonation of delay is found devoid of merit and is accordingly rejected. Consequently, Original Application is also dismissed. No costs.

**( K.N. Shrivastava )**
**Member (A)**

**( A.K. Bhardwaj )**
**Member (J)**

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