# Pabnesh Kumar Thakur & Others Vs Ashok Kumar & Others

**Court:** High Court Of Himachal Pradesh

**Date of Decision:** Jan. 7, 2025

**Acts Referred:** Constitution of India, 1950 â€" Article 16, 32, 226
Limitation Act, 1963 â€" Section 17

**Hon'ble Judges:** Vivek Singh Thakur, J; Rakesh Kainthla, J

**Bench:** Division Bench

**Advocate:** Sanjeev Bhushan, Rajesh Kumar, Dilip Sharma, Manish Sharma, K.S. Banyal, Uday Singh Banyal

**Final Decision:** Disposed Of

## Judgement

Rakesh Kainthla, J

1. The present appeal is directed against the judgment dated 24th August 2024passed in CWP No. 4774 of 2015, titled Ashok Kumar Vs. H.P. Vidhan

Sabha & others, vide which writ petition filed by respondent No. 1 (original petitioner) was allowed, and the present respondent No.2 (original

respondent No.1) was directed to re-calculate the marks of all the answers correctly provided by the petitioner and thereafter re-determine the

seniority based on merit. (The parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Single

Judge for convenience).

2. Briefly stated, the facts giving rise to the present appeal are thatthe petitioner filed a writ petition seeking a writ of certiorari for setting aside the

seniority list for the year 2001 onwards in which the petitioner was shown at serial No.5, writ of mandamus directing respondent No. 1 to correct the

seniority list and take disciplinary action against the erring official. It was asserted that the petitioner and others were appointed as clerks by

respondent No.1 on 20.02.2001. The petitioner was placed at Sr. No. 5 in the seniority list. He filed two representations regarding his seniority, which

were rejected on the ground that seniority was assigned as per the merit obtained in the examination conducted for selecting the clerks. The petitioner

was also told that the record of selection was not available.Ripon Kumar obtained the attested copies of the marksheet under the Right to Information

Act on 19.10.2011. He informed the petitioner in July 2015 regarding the supply of information. The petitioner went through the marks and found that

they were not correctly awarded for educational qualification. He filed an application to allow him to inspect the record regarding the recruitment. He

also found a document containing the marks regarding the recruitment of clerks lying in the waste papers. The petitioner was awarded 109 marks.

The person who was awarded less marks was shown higher in the merit. Two separate final lists were prepared on 18.02.2001; the petitioner was

shown asthe topper in one list, having secured 109 marks, whereas he was shown to have been awarded 102 marks in the second list. The marks of

the petitioner were lowered in the second list to give the benefit to the respondents. Therefore, a writ petition was filed to seek the relief.

3. The writ petition was opposed by the respondents by filing separate replies.

4. The record of the selection was requisitioned by the learned Single Judge,who found that the petitioner was not awarded the marks for all the

answers correctly answered by him. It could be a bona fide error of calculation or a deliberate attempt to lower the merit of the petitioner. The claim

of the petitioner could not be defeated on the grounds of delay and latches. The marks of the petitioner were lowered by practising fraud upon him.

The fraud and illegality vitiated the entire process. The petitioner had no reason to approach the Court before detecting the foul play. Hence, the writ

petition was allowed, and necessary direction was issued to respondent No.1 to re-calculate the marks of all the answers correctly provided by the

petitioner and thereafter re-determine the seniority.

5 Aggrieved from the judgment, the private respondents have filed the present appeal, asserting that the learned Single Judge erred in issuing a

direction to re-calculate the marks of all answers correctly provided by the petitioner and re-determine the seniority after the lapse of 24 years. Such

directions are in violation of the judgments passed by this Court and HonÃ¢â‚¬â„¢ble the Supreme Court. The Secretary, Himachal Pradesh Vidhan Sabha,

was the custodian of the record, who had handed over the entire record to the Establishment Branch of Vidhan Sabha on 11.12.2006. Petitioner was

posted in the Establishment Branch. The private respondents cannot be faulted for the acts committed by the officials of the Vidhan Sabha. They

cannot be punished for not taking action for non-tracing of record or the F.I.R. to its logical conclusion. The petitioner had access to the record, and

his plea that he did not know about the marks was not acceptable. He deliberately kept silent for a long period and approached the Court with a

concocted story. The present petition involved the determination of highly disputed facts, which is beyond the scope of the writ proceedings. The

seniority list was challenged after 15 years. The answer sheet cannot be evaluated without the answer key. Therefore, it was prayed that the present

appeal be allowed and judgment passed by the learned Single Judge be set aside.

6. We have heard Mr Sanjeev Bhushan, learned Senior Counsel, with Mr Rajesh Kumar, learned counsel for the appellants/private respondents, Mr

Dilip Sharma, learned Senior Advocate, with Mr Manish Sharma, learned counsel for respondent No.1, and Mr K.S. Banyal, learned Senior Counsel

with Mr Uday Singh Banyal, learned counsel for respondent No.2-Vidhan Sabha.

7. Mr. Sanjeev Bhushan, learned Senior Counsel for the appellants/private respondents, submitted that the writ petition involved a highly disputed

question of fact. The writ was barred by delay and latches. The petitioner had access to the record, and he could not have benefited from his own

wrongs. He approached the Court after a considerable lapse of time; therefore, he prayed that the present appeal be allowed and the judgment passed

by the learned Single Judge be set aside. He relied upon the following judgment in support of his submissions:-

a. Shiba Shankar Mohapatra & Ors vs State Of Orissa & Ors 2010(12) SCC 471 (relevant para: 12, 18, 22, 28, 30);

b. Ramchandra Shankar Deodhar & Ors vs The State of Maharashtra & Ors AIR 1974 SC 259

c. HS Vankani&Ors vs State of Gujarat 2010 (4) SCC 301(relevant paragraphs: 38, 39);

d. Bimlesh Tanwar vs state of Haryana 2003 (5) SCC 604 (relevant para: 54

e. Malcom Lawrence vs Union Of India 1976 (1) SCC 599(relevant para-8)

f. RS Makshi and Ors vs IN Menon and ors 1982 (1) SCC 379 (relevant para: 16, 22, 28(delay), 36)

g. Suresh Kapoor &ors vs State of H.P. and Ors (relevant paras: 11, 15, 17, 25, 26, 35, 37

h. Kameswar vs State of H.P. and Ors CWPOA No. 3082/2019 (relevant para: 18)

i. MrinmoyMaity Vs ChhandaKoleyAnd Ors 2024 Scc Online Sc 551 (relevant para: 11,12, 13)

j. Joshi Technology vs UOI, 2015(7) SCC 728 (relevant paras 68-69

k. Chairman Grid Corpn. of Orissa ltd vs Sukamani Das (1999) 7 SCC 398 (relevant para 6)

l. Rathore vs State of Haryana, (2005) 10 SCC 1 (relevant para-16)

m. Ramjas Foundation and another vs. Union of India and others, (2010) 14 SCC 38, Para 21

n. Kushadurupa vs state of Odisha, (2024) 4 SCC 432. (relevant Para 3)

8. Mr. Dilip Sharma, learned Senior counselfor respondent No.1 (original petitioner), submitted that the learned Single Judge had rightly allowed the

writ petition. There were glaring errors in the evaluation process. The marks awarded to the petitioner in the math section were not added. The Court

was justified in directing the Secretary, Vidhan Sabha to re-calculate the marks not so awarded. He relied upon the judgment of the HonÃ¢â‚¬â„¢ble

Supreme Court in the High Court of Tripura through the Registrar General vs Tirtha Sarathi Mukherjee & Others, 2019 (16) SCC 663 in support of his

submission.

9. Mr. K.S.Banyal, Senior Counsel with for respondent No.2, submitted that the seniority cannot be disturbed after such a long time. Therefore, he

prayed that the present appeal be allowed.

10. We have considered the submissions madeat the bar and have gone through the records carefully.

11. It is apparent from the record produced before the learned Single Judge and also before us that the marks awarded to the petitioner in the math

section were not calculated/addedto the overall score of the petitioner. The petitioner cannot be faulted for the same, and the learned Single Judge

was justified in issuing the direction to Secretary to Vidhan Sabha to re-calculate the marks of all the answers correctly provided by the petitioner and

thereafter re-determine the seniority based on merit. It was laid down in High Court of Tripura v. Tirtha Sarathi Mukherjee, (2019) 16 SCC 663:

2019 SCC OnLine SC 139 that where the questions were not evaluated, the High Court is justified in directing the re-evaluation. It was observed at

page 670:

Ã¢â‚¬Å“20. The question, however, arises whether, even if there is no legal right to demand re-valuation as of right, could there arise circumstances which leave the Court

in any doubt at all. A grave injustice may be occasioned to a writ applicant in certain circumstances. The case may arise where, even though there is no provision for

re-valuation, it turns out that despite giving the correct answer, no marks are awarded. No doubt, this must be confined to a case where there is no dispute about the

correctness of the answer. Further, if there is any doubt, the doubt should be resolved in favour of the examining body rather than in favour of the candidate. The

wide power under Article 226 may continue to be available even though there is no provision for re-valuation in a situation where a candidate, despite having

giventhecorrect answer and about which there cannot be even the slightest manner of doubt, he is treated as having given the wrong answer, and consequently,

the candidate is found disentitled to any marks.Ã¢â‚¬â€‹ (Emphasis supplied)

Ã, 12. The petitioner has placed on record the information supplied under the Right to Information Act (Annexure P-12), wherein he was shown to

have secured 102 marks. He has also placed on record information received under the Right to Information Act (Annexure P-13), wherein he is

shown to have secured 109 marks.

13. Respondent No.1-Vidhan Sabha stated in para 1 of the reply that the original record of the evaluation and merit list prepared by the Selection

Committee was not traceable, and this fact came to the notice of the Vidhan Sabha when the petitioner sought information under Right to Information

Act.Immediately, a complaint was lodged in the Police Station Boileauganj. Memos were issued to the concerned officers/officials. The entire record

was traced, and it was found that the records/mark sheet appended and relied upon by the petitioner was forged and fabricated, which was

deliberately and wilfully annexed to get the benefit. This reply of the Vidhan Sabha corroborates the version of the petitioner that the record was not

traceable, and when he demanded the information, he was told that the record was missing. Hence, the petitioner had a reasonable cause for not

approaching the Court earlier. He did not know the marks allotted to him, and he only found out his marks after going through the information provided

under the Right to Information Act.

14. Learned Single Judge was correct in holding that respondent No.1 had not taken the complaint to its logical conclusion. The record was found

missing, and subsequently, it was traced. It was mentioned that the show cause notice was issued to the concerned officers/officials, but there is no

explanation as to why it was not taken to the logical conclusion. The notice was also issued to the petitioner for manufacturing the documents, but

again, this was not taken to a logical conclusion. This shows that everything was not right with the selection process.

15. A perusal of the original selection record shows that the answers of the petitioner were not evaluated, and there is a discrepancy; therefore, the

learned Single Judge was justified in issuing the directions to evaluate the answers not so evaluated earlier at the time of the original selection process.

16. There is no dispute with the proposition of law that the settled seniority cannot be disturbed after a considerable delay; however, this is not an

absolute rule. It was laid down by HonÃ¢â‚¬â„¢ble Supreme Court in Ramchandra Shankar Deodhar v. State of Maharashtra, (1974) 1 SCC 317:

1974 SCC (L&S) 137: 1973 SCC OnLine SC 33 3that the principle of delay is one of the discretion and does not prevent the High Court from

exercising the jurisdiction under Article 226 of the Constitution of India in an appropriate case. It was observed at page 325:

Ã¢â‚¬Å“10. The first preliminary objection raised on behalf of the respondents was that the petitioners were guilty of gross laches and delay in filing the petition. The

divisional cadre of Mamlatdars/Tehsildars were created as far back as November 1, 1956, by the Government Resolution of that date, and the procedure for making

promotion to the posts of Deputy Collector on the basis of divisional select-list, which was a necessary consequence of the creation of the divisional cadre of

Mamlatdars/ Tehsildars, had been in operation for a long number of years, at any rate from April 7, 1961, and the Rules of July 30, 1959, were also given effect to since

the date of their enactment and yet the petitioner did not file the petition until July 14, 1969. There was a delay of more than ten or twelve years in filing the petition

since the accrual of the cause of complaint, and this delay contended the respondents, was sufficient to disentitle the petitioners to any relief in a petition under

Article 32 of the Constitution. We do not think this contention should prevail with us. In the first place, it must be remembered that the rule which says that the Court

may not inquire into belated and stale claims is not a rule of law but a rule of practice based on sound and proper exercise of discretion, and there is no inviolable rule

that whenever there is delay, the Court must necessarily refuse to entertain the petition. Each case must depend on its own facts. The question, as pointed out by

Hidayatullah, C.J., in TilokchandMotichand v. H.B. Munshi [(1969) 1 SCC 110, 116 : (1969) 2 SCR 824] Ã¢â‚¬Å“is one of discretion for this Court to follow from case to

case. There is no lower limit, and there is no upper limit .... It will all depend on what the breach of the fundamental right and the remedy claimed are and how the delay

aroseÃ¢â‚¬. [ SCC para 11] Here, the petitioners were informed by the Commissioner, Aurangabad Division, by his letter dated October 18, 1960 and also by the then

Secretary of the Revenue Department in January 1961 that the rules of recruitment to the posts of Deputy Collector in the reorganised State of Bombay had not yet

been unified, and that the petitioners continued to be governed by the rules of Ex-Hyderabad State and the Rules of July 30, 1959 had no application to them. The

petitioners were, therefore, justified in proceeding on the assumption that there were no unified rules of recruitment to the posts of Deputy Collector and the

promotions that were being made by the State Government were only provisional to be regularised when unified rules of recruitment were made. It was only when the

petition in Kapoor case was decided by the Bombay High Court that the petitioners came to know that it was the case of the State Government in that petition Ã¢â‚¬

and that case was accepted by the Bombay High Court Ã¢â‚¬" that the Rules of July 30, 1959, were the unified rules of recruitment to the posts of Deputy Collector

applicable throughout the reorganised State of Bombay. The petitioners thereafter did not lose any time in filing the present petition. Moreover, what is challenged in

the petition is the validity of the procedure for making promotions to the posts of Deputy Collector Ã¢â‚¬" whether it is violative of the equal opportunity clause Ã¢â‚¬" and

since this procedure is not a thing of the past, but is still being followed by the State Government, it is but desirable that its constitutionality should be adjudged

when the question has come before the Court at the instance of parties properly aggrieved by it. It may also be noted 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 the delay in filing the petition should

not be allowed to be disturbed unless there is a reasonable explanation for the delay. This principle was stated in the following terms by Hidayatullah, C.J. in

Tilokchand v. H.B. Munshi (supra):

Ã¢â‚¬Å“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.Ã¢â‚¬â€‹ [ SCC para 7]

Sikri, J., (as he then was), also re-stated the same principle in equally felicitous language when he said in R.N. Bose v. Union of India [(1970) 1 SCC 84 : (1970) 2 SCR

697]: Ã¢â‚¬Å“It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his

appointment and promotion affected a long time ago would not be set aside after the lapse of a number of years.Ã¢â‚¬ Here, as admitted by the State Government in para

55 of the affidavit in reply, all promotions that have been made by the State Government are provisional, and the position has not been crystallised to the prejudice of

the petitioners. No rights have, therefore, accrued in favour of others by reason of the delay in filing the petition. The promotions being provisional, they have not

conferred any rights on those promoted, and they are by their very nature liable to be set at nought if the correct legal position, as finally determined, so requires. We

were also told by the learned counsel for the petitioners, and that was not controverted by the learned counsel appearing on behalf of the State Government, that

even if the petition were allowed and the reliefs claimed by the petitioners granted to them, that would not result in the reversion of any Deputy Collector or

officiating Deputy Collector to the post of Mamlatdar/Tehsildar; the only effect would be merely to disturb their inter se seniority as officiating Deputy Collectors or

as Deputy Collectors. Moreover, it may be noticed that the claim for enforcement of the fundamental right of equal opportunity under Article 16 is itself a fundamental

right guaranteed under Article 32, and this Court, which has been assigned the role of a sentinel on the qui vive for protection of the fundamental rights cannot easily

allow itself to be persuaded to refuse relief solely on the jejune ground of laches, delay or the like.Ã¢â‚¬â€‹ (Emphasis supplied)

17. A similar view was taken by this Court in Suresh Kapoor v. State of H.P., 2022 SCC OnLine HP 6507, wherein it was observed:

Ã, Ã¢â‚¬Å“12. Normally, delay itself may not defeat the party's claim or relief unless the position of the opposite party has been irretrievably altered or would be put to

undue hardship. Delay is not an absolute impediment to exercise judicial discretion and rendering of substantial justice, and such matters lie in the exclusive

discretion of the Court, which discretion obviously has to be exercised fairly and justly. The underlying principle behind the dismissal of a petition on the ground of

delay and laches is to discourage agitation of stale claim and has to be construed from the perspective of the opposite party being prejudiced, especially when the

delay affects others' ripened rights, which may have attained finality. Each case will have to be decided on its own facts and merits. There may be cases where the

demand of justice is so compelling that the Court would be inclined to interfere in spite of delay. Ultimately, as observed above, it would be a matter within the

discretion of the Court.Ã¢â‚¬â€‹

18. Similarly, it was held in Shiba Shankar Mohapatra v. State of Orissa, (2010) 12 SCC 471 : (2011) 1 SCC (L&S) 229: 2009 SCC OnLine

SC 1801 that ordinarily a belated challenge to the seniority should not be entertained but the petitioner can satisfactorily explain the delay. It was

observed at page 483:

Ã¢â‚¬Å“30. Thus, in view of the above, the settled legal proposition that emerges is that once the seniority has 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.Ã¢â‚¬â€‹

19. In the present case, the selection process is shrouded in suspicion, the different informations under the Right to Information Act were provided,

showing the different marks of the petitioner. The original records show that the answers of the petitioner were not evaluated. Hence, the learned

Single Judge was right in holding that the fraud was writ large and a person cannot be allowed to take advantage of the illegalities in the selection

process and fraud committed during the same; hence, the delay cannot be used to justify a claim based upon the illegality. It was laid down by the

HonÃ¢â‚¬â„¢ble Supreme Court in Commr. of Customs v. Candid Enterprises, (2002) 9 SCC 764: 2001 SCC OnLine SC 51 4that fraud nullifies

everything, and when the Court is satisfied that the fraud was committed, it can hear and entertain the matter. It was observed at page 765:

Ã¢â‚¬Å“6. The Tribunal would appear to have lost sight of the cardinal principle which is enshrined in Section 17 of the Limitation Act that fraud nullifies everything. If

the Tribunal was satisfied, as it ought to have been upon these facts, that there might be some fraud, there was every reason for it to condone the delay and to hear

the appeal. The judgment in Ajit Singh Thakur case [(1981) 1 SCC 495: 1981 SCC (Cri) 184] has no application to facts such as these.

20. It was submitted that there are disputed questions of fact, and the learned Single Judge erred in issuing the direction. This is not acceptable. A

bare perusal of the answersheets of the petitioner shows that he was not given 10 marks for answers marked as correct. This was apparent from the

record and did not require any investigation. Learned Single Judge had not gone into the question whether the petitioner had secured 102 marks or 109

marks and whether the information was correct or not. He had decided the matter based upon the bare perusal of the answer sheet in which 10

answers were not evaluated. Therefore, it cannot be said the learned Single Judge had ventured into the determination of any disputed question of

facts while deciding the writ petition.

21. This case shows that while deciding the writ petition, the Court came across glaring mistakes committed by original respondent No.1. It had failed

to evaluate the marks given to the petitioner and declared him lower in merit than he actually was, had he been awarded the correct marks for the

answers marked by him. The record was not initially available and was shown to be untraced. The complaints made to the police were not taken to

the logical conclusion clearly suggesting that there was something more than what meets the eye.Hence, the facts were so glaring and so shocking

that the Court could not have shut its eyes to them. The Court is meant to uphold the rule of law and acts asa Ã¢â‚¬Å“Sentinel on the qui viveÃ¢â‚¬;

therefore, it was bound to interfere and remedy the defect, which was noticed by it during the pendency of the proceedings, and it was justified in

issuing the direction to award marks for the questions attempted by the petitioner. We see no other fit case where the Court should have protected the

right of a person, which was infringed by the illegalities in the selection.

22. It was submitted that the petitioner had access to the record, and he could have tampered with the same. This is not acceptable. There is nothing

on record to show that the petitioner had access to the record or that he could have tampered with it. Vidhan Sabha had not taken any action against

the petitioner regarding tampering with the record, therefore, it cannot be said that the petitioner is guilty of coming to the Court with unclean hands,

having tampered with the record.

23. It is not necessary to refer to the individual judgments cited at the bar as they deal with the undisputed questions of law that the seniority cannot be

challenged after inordinate delay; the party who comes to the Court with unclean hands is not entitled to any relief, and the Writ Court cannot decide

the disputed questions of facts. However, these principles do not apply to the facts of the present case, as shown above.

24. No other point was urged.

25. In view of the above, there is no infirmity in the judgment passed by the learned Single Judge, hence, the present appeal fails, and the same is

dismissed.

26. Appeal is disposed of in the aforesaid terms, so also pending application(s), if any.

27. Record of the selection process retained by the Court be returned to Vidhan Sabha Secretariat.