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Delhi High Court

Case No: LPA 234 and 235 of 2008

The Food Corporation of India and Another — APPELLANT

Vs

Krishan Kumar Sodhi — RESPONDENT

Date of Decision: Sept. 27, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 9, 141
- Constitution of India, 1950 - Article 14, 16, 226, 309, 32
- Food Corporation of India Staff Regulations, 1971 - Regulation 15, 15(5), 16

Citation: (2010) 173 DLT 227

Hon'ble Judges: Dipak Misra, C.J; Manmohan, J

Bench: Division Bench

Advocate: Virender Kumar Sharma, for the Appellant; S.R. Singh and M.M. Singh, for the Respondent

Final Decision: Allowed

Judgement

Dipak Misra, C.J.

In these two appeals, the vulnerability of the composite order dated 17th January, 2008 passed by the learned Single Judge in WP(C) 3720/2006 and WP(C) No. 14198/2004 being called in question, they were heard analogously and are disposed of by a singular order. For the sake of clarity and convenience, the facts in WP(C) No. 14198/2004 are unfurled herein. This Court shall also advert to the necessitous facts in brief in the other writ petition.

2. The respondent-petitioner (hereinafter referred to as ''the respondent'') was appointed as a typist on daily wage basis on 17.6.1972 at the Headquarters, New Delhi of the Food Corporation of India, the appellant-herein, vide letter dated 13.6.1972 and her services were regularized on 26.2.1976. From 1972 till the date of regularization, she worked continuously as daily wage typist and thereafter was

promoted to the post of Assistant Grade-II on 14.8.1987 and to the post of Assistant Grade-I in October, 2002. It was contended before the learned Single Judge that in the case of similarly placed typists, namely, Shri S.K. Bassi and Shri V. Shekhar, the period spent on daily wage basis was taken into consideration while fixing their seniority, but similar benefits were not extended to her. She made representations from time to time and eventually vide communication dated 3.5.2000, she was given a reply that the Zonal Office was not competent to decide and fix the seniority of daily wagers. She was advised to approach the concerned appointing authority. As set forth, the respondent made further representations but there was no response and her seniority was not fixed as sought for. In this backdrop, a prayer was made to issue a writ of mandamus to re-fix the seniority giving the benefit of the period spent as a daily wager and after computing the seniority on that foundation extend the consequential benefits of promotion, etc.

3. The averments made in the writ petition were disputed by the present appellant contending, inter alia, that five typists in all were given the benefit of the period spent on daily wage basis by the competent authority at the headquarters in terms of Regulation 15(5) of the Food Corporation of India (Staff) Regulation, 1971 (for short ''the Regulations'') but the petitioner approached the zonal authority. It was also contended that the writ petitioner was claiming seniority after expiry of 28 years and, hence, her case did not deserve to be considered for re-fixation of seniority. Quite apart from the above, it was urged that the appointing authority had not been impleaded as a party.

4. The learned Single Judge took note of the fact that the Food Corporation of India is a statutory authority; that the plea put forth by the writ petitioner to the extent that there was no ground for discrimination has gone undisputed; the other daily wagers had been given the benefit and the same has been sought to be justified on the foundation that it was done by the appointing authority or at the headquarter, but the said explanation does not stand to reason; that the Food Corporation of India is unable to explain how some of the employees, namely, Shri S.K. Bassi, Shri V. Shekhar and five other typists were extended the benefit and the cases of the writ petitioners were ignored; that the discretion exercised by the Food Corporation of India was arbitrary and the explanation proferred was unacceptable; that the appointing authority has no unfettered discretion to act in such a manner and; that the doctrine of delay and laches does not get attracted to the case at hand and, accordingly, he directed the corporation and its functionaries to fix the seniority of the petitioner taking into consideration her date of appointment, i.e., 17.6.1972.

5. Be it noted, in CWP No. 3720/2006, the petitioner was appointed as a typist on daily wage basis on 30.12.1971 and his services were regularized on 29.8.1972. He was promoted to the post of Assistant Grade-II in on 14.5.1977 and to the post of Assistant Grade-I with effect from 4.10.2000. He has placed reliance on the decision in V. Shekhar v. Food Corporation of India passed in CWP No. 5256/1998 who has

been given seniority with effect from 26.6.1970.

6. We have heard Mr. Virender Kumar Sharma, learned Counsel for the appellant and Mr. S.R. Singh, learned senior counsel along with Mr. M.M. Singh for the respondent.

7. The learned Counsel for the petitioner has submitted that there is no provision for fixation of seniority of a daily wager. It is his further submission that if the period has to be computed, it has to be on the basis of a direction from the appointing authority, i.e., the competent authority from headquarter and from a zonal authority. Learned Counsel has further proponed that the claim for re-fixation of seniority is hit by the doctrine of delay and laches and also defeated by non-impleadment of necessary parties.

8. The learned Counsel for the respondent, in support of the order passed by the learned Single Judge, has contended that the doctrine of delay and laches is not applicable to the case at hand as the respondents were submitting representations and the same came to be dealt with in 2000. It is urged by him that the Food Corporation of India, being a statutory authority, cannot exercise unfettered discretion as such exercise of unbridled power is impermissible in law. It is propounded by him that there was no necessity to implead any other party as the writ petitioners were claiming the benefit under the Regulations which has been extended to others and it was incumbent upon the Food Corporation of India to treat them with parity.

9. The question that emerges for consideration is whether the learned Single Judge is justified in directing re-fixation of seniority of the writ petitioners by treating the period spent by them on daily wage basis to be counted towards seniority. Regulation 15 of the Regulations deals with probation. Sub-regulation (5) on which emphasis has been laid reads as follows:

15. Probation:-(1) xxx

(2) xxx

(3) xxx

(4) xxx

(5) Where an employee has rendered continuous temporary service or continuous service on deputation in any post immediately preceding his regular appointment to such post, the period of service so rendered or no deputation may be counted against the period of probation if the appointing authority so directs.

Regulation 16 deals with the mode and method of determination of seniority.

10. As far as grant of fixation of seniority by computation of the period spent on daily wage basis as a typist is concerned, the same, in our considered opinion, need

not be adverted to in the case at hand though learned Counsel for the appellants has emphatically urged that such computation is not automatic but subject to the direction or order of the appointing authority who has never been approached and further there has to be recording of satisfaction by the said authority. We are disposed to think so as on the other two grounds, namely, the delay and laches and non impleadment of the necessary parties, the order of the learned Single Judge can be dislodged.

11. As has been indicated earlier, the writ petitioner in CWP No. 14198/2004 was appointed on 13.6.1972 and her services were regularized on 26.2.1976. The writ petitioner in CWP No. 3720/2006 was appointed on 30.12.1971 and his services were regularized on 29.8.1972. Both of them were promoted to the post of Assistant Grade-II in 1987 and 1977 respectively and Assistant Grade-I in the year 2002 and 2000. The learned Single Judge has applied the doctrine of parity and addressed himself with regard to the discriminatory treatment meted to the writ petitioners. As is evincible, regularization took place sometime in the year 1972 and 1976 as far as both the writ petitioners are concerned. They got promoted to the next post in the year 1977 and 1987and they were further promoted to Assistant Grade-I in 2000 and 2002. In course of hearing on a query being made, we have been apprised that presently they are holding the post of Managers. Therefore, the hub of the matter is whether at this juncture they should be extended the benefit of computation of the period when they worked as daily wage typists towards fixation of their seniority. The learned Counsel for the respondent urged that the question of seniority never arose. We are unable to appreciate the same inasmuch as the respondents have been given more than three promotions during this period and it is difficult to fathom that the seniority factor never arose. Thus, it is quite clear that the respondents had really prayed for re-fixation of seniority w.e.f. 1971 and 1972 there can be no shadow of doubt that the cause of their grievance arose at the time of regularization or even if a liberal approach is adopted when they were promoted to the post of Assistant Grade-II almost more than two decades back.

12. In P.S. Sadasivaswamy Vs. State of Tamil Nadu, a two-Judge Bench of the Apex Court has held thus:

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 matters.

13. In Karnataka Power Corporation Limited through its Chairman and Managing Director and Another Vs. K. Thangappan and Another, their Lordships have held thus:

6. Delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the Constitution. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Even where fundamental right is involved the matter is still within the discretion of the Court as pointed out in Durga Prashad Vs. Chief Controller of Imports and Exports, Of course, the discretion has to be exercised judicially and reasonably.

14. In City and Industrial Development Corporation Vs. Dosu Aardeshir Bhiwandiwala and Others, the Apex Court has opined thus:

19. It is well settled and needs no restatement at our hands that under Article 226 of the Constitution, the jurisdiction of a High Court to issue appropriate writs particularly a writ of Mandamus is highly discretionary. The relief cannot be claimed as of right. One of the grounds for refusing relief is that the person approaching the High Court is guilty of unexplained delay and the laches. Inordinate delay in moving the court for a Writ is an adequate ground for refusing a Writ. The principle is that courts exercising public law jurisdiction do not encourage agitation of stale claims and exhuming matters where the rights of third parties may have accrued in the interregnum.

20. The appellant in its reply opposing the admission of Writ Petition in clear and categorical terms pleaded that the writ petitioner has kept silent for more than 35 years and filed belated writ petition. It was asserted that on account of inordinate delay and laches the writ petition suffers from legal infirmities and therefore liable to be rejected in limine. The High Court did not record any finding whatsoever and ignored such a plea of far reaching consequence.

15. In Eastern Coalfields Ltd. Vs. Dugal Kumar, the Apex Court has ruled thus:

20. Suffice it to say that in Express Publications (Madurai) Ltd. and Another Vs. Union of India (UOI) and Another, this Court referring to Ramchandra Shankar Deodhar and Others Vs. The State of Maharashtra and Others, explained the principle thus;

No hard and fast principle can be laid down that under no circumstances delay would be a relevant consideration in judging constitutional validity of a provision. It has to be remembered that the constitutional remedy under Article 32 is discretionary. In one case, this Court may decline discretionary relief if person aggrieved has slept over for long number of years. In another case, depending upon the nature of violation, court may ignore delay and pronounce upon the invalidity of a provision. It will depend from case to case.

16. From the aforesaid enunciation of law, it is manifest that while issuing of a writ of mandamus the court has to be guided by the concept of applicability of doctrine

of delay and laches. A litigant who invokes the extra-ordinary and inherent jurisdiction of this Court, it is obligatory on his part to come to the court at the earliest and at least within a reasonable span of time. When there is a belated approach claiming seniority or promotion, in a way, is not permissible to issue any direction because with the efflux of time the interest of third parties get ripened. Quite apart from the above, the equity that might have gone in his favour does not deserve adjudication as the said equity with the passage of time becomes extinct. Interference after enormous delay is likely to create a state of anarchy or chaos. True it is, no straight-jacket formula can be laid down for fixing any kind of limitation but the factual matrix has to be taken into consideration for the courts cannot be totally oblivious of the same. In the case at hand, the respondents knew about the rules in force. After their regularization they were promoted to the post of Assistant Grade-II, Assistant Grade-I and thereafter to the post of Manager. The spacious plea that they were not aware of the fixation of seniority does not appeal to us. We are disposed to think they have approached this Court for fixation of seniority almost after 20 years. Definitely, such a claim for seniority is a stale one. It would not be out of place to say that they have actually waived the claim. It is worth noting their singular prayer is for re-fixation of seniority and hence, issue of writ of a mandamus at this stage, according to us, is totally unwarranted.

17. The next aspect which ways against the respondents is that though they have made the allegations that five of the employees have been extended the benefit for the period they had worked as daily wagers they have been discriminated. From the nature of averments, there cannot be trace of doubt that the said persons have been treated as seniors or to the respondents. Even if we understand differently, in case the seniority of the respondents are fixed on the basis of the claim put forth by them the seniority of others is likely to be affected. Despite the said fact situation, the respondents have chosen not to implead anyone of them as a party.

18. Regard being had to be fact situation, we may profitably refer to the decision in Indu Shekhar Singh and Others Vs. State of U.P. and Others, the Apex Court has held thus:

55. There is another aspect of the matter. The Appellants herein were not joined as parties in the writ petition filed by the Respondents. In their absence, the High Court could not have determined the question of inter se seniority. [See Prabodh Verma and Others Vs. State of Uttar Pradesh and Others, In Ram Janam Singh v. State of U.P. AIR 1994 SCW 1582 this Court held:

...It is now almost settled that seniority of an officer in service is determined with reference to the date of his entry in the service which will be consistent with the requirement of Articles 14 and 16 of the Constitution. Of course, if the circumstances so require a group of persons, can be treated a class separate from the rest for any preferential or beneficial treatment while fixing their seniority. But, whether such group of persons belong to a special class for any special treatment in

matters of seniority has to be decided on objective consideration and on taking into account relevant factors which can stand the test of Articles 14 and 16 of the Constitution. Normally, such classification should be by statutory rule or rules framed under Article 309 of the Constitution. The far-reaching implication of such rules need not be impressed because they purport to affect the seniority of persons who are already in service.

19. Recently, in Public Service Commission, Uttaranchal Vs. Mamta Bisht and Others, wherein the Apex Court was dealing with the concept of necessary party and the effect of non-impleadment of such a party in the matter wherein the selection process is challenged. Their Lordships have held thus:

7. ...in Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar, wherein the Court has explained the distinction between necessary party, proper party and proforma party and further held that if a person who is likely to suffer from the order of the Court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice. More so, proviso to Order I, Rule IX of Code of Civil Procedure, 1908 (hereinafter called CPC) provide that non-joinder of necessary party be fatal. Undoubtedly, provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of Section 141, CPC but the principles enshrined therein are applicable. (Vide Gulabchand Chhotalal Parikh Vs. State of Bombay (Now Gujarat), ; Babubhai Muljibhai Patel Vs. Nandlal Khodidas Barot and Others, ; and Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others,

8. In Prabodh Verma and Others Vs. State of Uttar Pradesh and Others, and Tridip Kumar Dingal and Others Vs. State of West Bengal and Others, it has been held that if a person challenges the selection process, successful candidates or at least some of them are necessary parties.

20. From the aforesaid pronouncement of law, it is clear as crystal that an affected party has to be impleaded inasmuch as that is the mandate of the doctrine of audi alteram partem. The respondents have, in a way, claimed advantage of seniority on the base of a rule while knowing fully well some have been extended the benefit of the rule as has been stated earlier. The contention of the learned Counsel for the appellant is that extension of the benefit is not automatic. Be that as it may, when the seniority of others is likely to be affected and their rights are likely to be jeopardized, it was imperative on the part of the writ petitioner to implead them as parties. The same having not been done, no relief could have been granted to the respondents by the writ court.

21. In view of our preceding analysis, we are unable to concur with the view expressed by the learned Single Judge and resultantly the appeals are allowed and the order impugned is set aside. In the facts and circumstances of the case, there shall be no order as to costs.