Amrit Lal Berry

Vs

Collector of Central Excise, New Delhi and Others

And

K. N. Kapur and Others

Vs

Collector of Central Excise, Central Revenue and Others

Writ Petitions Nos. 463 of 1971 and 2004 of 1973

(M. H. Beg, V. R. Krishna Iyer, P. K. Goswami JJ)

10.12.1974

JUDGMENT

BEG, J. –

1. Amrit Lal Berry in Writ Petition No. 463 of 1971 and K. N. Kapur and 14 other in Writ Petition No. 2004 of 1973 have applied to this Court under Article 32 of the Constitution of India. They complain of violation of Article 16 of the Constitution on the ground that they were illegally discriminated against by the respondent inasmuch as they were not confirmed and then promoted when they ought to have been. They assert that if, according to the applicable rule, they had been assigned their correct places in the seniority lists, as laid down in the officer memorandum dated 22-6-1949, prepared by the Ministry of Home Affairs, they would have been duly promoted. Each of them on similar fact, relies upon the law laid down by this Court in Union of India v. M. Ravi Varma ((1972) 2 SCR 992 : (1972) 1 SCC 379). Assertions in the petition of Amrit Lal Berry illustrate the nature of the cases of all the petitioners. We will indicate the cases of the parties before we take up the questions of law arising for consideration and decisions by us here.

2. Amrit Lal Berry was appointed Inspector in the Central Excise Collectorate at Delhi, by orders dated 22-11-1948, and, on 4-12-1948, was posted at Ferozepur. On 22-6-1949, the Ministry of Home Affairs issued memorandum containing the principal that the seniority of existing Government servants will be determined by the date of their appointment and not from the date of their confirmation. The petitioner asserts that, in his seniority in the list issued in 1958 after the petitioner had been confirmed in a permanent post under an order dated 5-5-1956 with effect from 1-7-1955. An extract from the order shown that, although, the petitioner is a B.A. and shown as appointed on 15-12-1948, and, Barinder Singh, the Inspector next in order of seniority, who was only a Matriculate, appointed subsequently on 7-2-1949, was confirmed retrospectively with effect from 1-7-1953, that is to say, two years earlier than the petitioner. There is, however, a difference in age shown between the two inasmuch as the date of birth of the petitioner is given as 5-4-1925 whereas that of Narinder Singh is shown as 24-7-1911. The petitioner points out that, despite these different dates of confirmation of Inspectors so that juniors were sometimes confirmed earlier, they

retained their seniorities in accordance with the office memorandum of 22-6-1949 which made the length of service the only material consideration for purposes of seniority. But, after the officer memorandum dated 22-12-1959, the rule applied was altered in the Excise Department. New seniority lists were prepared in which seniorities were determined from the dated of confirmation. The result was that Government servants, who ought to have been placed below the petitioner have been, it is asserted, promoted as Superintendents of Central Excise in the years 1970 to 1971. The petitioner gave a list of twelve juniors who have been so promoted because, according to him, the impugned seniority list of 1-7-1967 illegally put them above the petitioner. The petitioner also complained that, owing to the illegally prepared seniority list, he had been given the grade of a Senior Inspector only on 8-12-1967 and not with effect from 21-3-1961 as it ought to have been done. The petitioner complains of the allegedly illegal confirmations going as far back as 1955, and illegal seniority lists prepared after 22-11-1959. He has annexed copies of representations dated 6-3-1965, and, 13-8-1971, to which, according to him, no replies were given. The petitioner, therefore, came to this Court seeking relief against what he describe as the impugned list which, according to paragraph 8 of his petitioner is dated 1-7-1967 (Annexure 7 to his petition), and to allegedly illegal promotions of juniors without setting out the names or dated of promotions of all those so promoted. Presumably, these promoted Inspectors are the 77 persons impleaded as respondents 5 to 81 in the petition before us. Out of these, only twelve, with their places shown as lower than the petitioner's number 204 in the list prepared before 1959, were specifically mentioned in the list of allegedly illegal promotions of 1970-71. Amrit Lal Berry's petition to this Court was filed on 9-12-1971.

3. By an application dated 9-3-1973, Amrit Lal Berry sought an amendment of his writ petition asking this Court to quash the Office Memorandum dated 22-7-1972 on the ground that it does not interpret correctly the judgment of this Court in Ravi Varma's case (supra) delivered on 4-1-1972. The petitioner contends that office memorandum, dated 22-7-1972, was based on a wrong interpretation of the law laid down by this Court inasmuch as, while determining the seniority of the petitioner according to the 1949 rule, it does not award consequential benefits which would have been reaped by the petitioner in the past, if the seniority rule, laid down in the 1949 memorandum, had been followed in the past.

4. K. N. Kapur and 14 others also give the dated of their appointments as Inspectors ranging from 15-5-1944 in the case of K. N. Kapur to 19-1-1950 in the case of Ravinderlal. The dates of confirmation vary from 1-7-1956, in the case of K. N. Kapur, to 1-12-1962, in the case of S. L. Chopra. The dates of their entry into the senior grade also extend from 29-3-1965, in the case of M. S. Ahluwalia, to 22-11-1971, in cases of P. L. Sharma and R. L. Kapania. Columns in a list given in the writ petition, showing the serial numbers according to the seniority list prior to 22-12-1959 and the subsequent seniority list of 1961, show wide gaps the biggest of which is in the case of K. N. Kapur who came down from his place at No. 32 to No. 252. The seniority list complained of was, however, stated to be the one prepared in 1961. All the petitioners assert that the seniority lists of 1958 to 1959 were correctly prepared in accordance with the officer memorandum of 22-6-1949. The whole mischief, according to the petitioners, resulted from misplacing of the names of the petitioners, after the 1959 memorandum, in the seniority list of 1961, which ignored the correct or applicable principle for preparation of the seniority lists according to the memorandum of 1949.

5. The writ petition of K. N. Kapur and 14 others dated 20-10-1973 was filed on 22-10-1973. In this petition, it is asserted that the office memorandum dated 22-7-1972 issued by the Ministry of Home Affairs (Annexure 'D' to the petition) and the office memorandum, dated 16-3-1973, and 17-3-1973, issued by the Ministry of Finance, are illegal inasmuch as they do not properly give effect to the

decision of this Court in Ravi Varma's case (supra). The petitioners asked for the quashing of officer memorandum dated 22-7-1972 prepared by the Ministry of Home Affairs and the office memoranda dated 16-3-1973 and 17-3-1973 prepared in the Ministry of Finance. The further relief asked for is that this Court may direct the Collector of Central Excise and the Union of India to implement the decision of this Court given on 4-1-1972 in Ravi Varma's case (supra) so that the office memorandum dated 22-6-1949 and not the office memorandum dated 22-12-1959 may govern the cases of petitioners. They also claim the award of all benefits consequential to the correct preparation of seniority list, such as confirmations, promotions, and payments of amounts which should have been made in the past.

6. The petitions were opposed on various grounds. The alleged violation of the law by the memoranda of 1972 and 1973 were, it was submitted, only attempts made by the opposite parties to adjust the operations of two opposing principles of justice and law laid down by this Court : the seniority according to length of service rule of 1949 and what may be called the principle of non-disturbance of rights claimed due to confirmations of promotions to a higher post going far back. It was submitted that there had been no infringement of any right or provision of law at all. Alternatively, it was urged that even, if the petitioners could make out violation of any applicable rules of law, regulating the conditions of service of the petitioners, they do not establish the denial of any fundamental right of the petitioners conferred by Article 16 of the Constitution. In any event, the petitions are said to be barred by the principle of laches and acquiescence. It was also suggested by the learned counsel for the opposite parties, particularly in the case of K. N. Kapur and others, that the cause of action asserted by each alleged infringement of right being separate on each occasion it should have been made the subject matter of a distinct and separate petition assailing the particular alleged infringement on each occasion. In the case of K. N. Kapur and others, the contention appeared to be that there was not only a misjoinder of causes of action but also of a number of petitioners each of whom could only have a separate cause of action whenever any alleged violation of a fundamental right took place. It was also submitted that the assertions in the applications did not contain necessary averments to establish violations of fundamental rights to that petitions under Article 32 of the Constitution should be dismissed in limine on this ground alone. It was pointed out that the petition of K. N. Kapur and others did not ever disclose a demand made to the opposite parties to do justice, followed by its refusal by the opposite parties, so that a condition precedent to the issue of a writ of mandamus was also wanting here.

7. It is true that assertions in each of the two petitions are of a very general character. The petitions seem to rest on the assumption that all that need be asserted is the violation of some rule contained in an office memorandum which governed the rights of the petitioners in the past. There is no doubt that the officer memorandum of 22-7-1972 was issued, in consequence of the decision of this Court in Ravi Varma's case (supra) dated 4-1-1972, to meet the situation created by it in the context of previous office memoranda on the subject. If the 1972 memorandum correctly interprets and applies the law laid down by this Court there would be no need to proceed further with the consideration of the petitions before us. This memorandum itself gives the history of previous relevant office memoranda and the need for their displacement by new instructions due to the decision of this Court in Ravi Varma's case. It reads as follows :

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No. 9/3/72-Estt.(D)

Government of India

Cabinet Secretariat,

Department of Personnel,

New Delhi, dated the 22nd July, 1972.

OFFICE MEMORANDUM

Subject :- Supreme Court-Civil Appeals Nos. 1845 of 1968, 1846 of 1968 and 50 of 1969 - Interpretation of Ministry of Home Affairs O.M. No. 9/11/55-RPS., dated 22-12-1959, regarding general principles for determining seniority of various categories of persons employed in Central Services.

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As the Ministry of Finance, etc. are aware, under the orders contained in Ministry of Home Affairs O.M. No. 30/44/48-Apptts., dated 22-6-1949, (copy enclosed as Annexure I), seniority in a grade was to be determined, as a general rule, on the basis of the total length of continuous service in the grade, as well as service in the equivalent grade, the term "Service in an equivalent grade" being defined as service on rate of pay higher than the minimum of the time-scale of the grade concerned, irrespective of whether it was rendered in the Central of Provincial Government in India or Pakistan. Seniority of persons appointed on a permanent or quasi-permanent basis prior to the 1st January, 1944 was, however, not disturbed by the office memorandum of 22-6-1949. The instructions contained in that O.M. were issued in order to safeguard the interests of displaced Government servants appointed to Central Services after partition, but as it was not possible to regulate the seniority of only displaced Government servants by giving them credit for previous service, the instruction of 22-6-1949 referred to above were made applicable to other categories of persons also appointed to Central Services. There were, however, certain services/posts which were exempted from the operation of the O.M. of 22-6-1949. In the course of time, displaced Government servants had, by and large, been absorbed in the various Central Services and their seniority fixed with reference to the length of service rendered by the, as provided in the O. M. of 22-6-1949. It was, therefore, felt that it was no longer necessary to apply the instructions of 22-6-1949 in preference to the normal principles for determination of seniority. As a result, revised principles of seniority were issued in December, 1959, in consultation with the Union Public Service Commission, vide Ministry of Home Affairs O. M. No. 9/11/55-RPS, dated 22-12-1959 (copy enclosed as Annexure II), which is still in force.

2. As would be seen from paras 2 and 3 of the O.M. of 22-12-1959 mentioned above, except as otherwise provided in that O.M. or except for such services and posts for which separate principles (sic) had already been issued or which might be issued thereafter, the seniority of all persons appointed to the various Central services after the date of that O.M. (viz. 22-12-1959) was to be determined in accordance with the general principles of seniority contained in the annexure to that O. M. and those general principles were not to apply with retrospective effect. According to para 2 of the annexures to that O.M. persons appointed in a substantive or officiating capacity

to a grade prior to the issue of the general principles of seniority shall retain their relative seniority already assigned to them, or such seniority as may thereafter be assigned to them under the existing order applicable to their cases and shall on block be senior to all others in that grade. However, para 3 of the annexure provides that permanent officers of each grade shall be ranked senior to persons who are officiating in that grade.

3. Keeping in view the objectives of the revised instructions contained in the O.M. of 22.12.1959, the Ministry of Home Affairs (now department of personnel) have all along held that while persons appointed prior to 22.12.1959 will retain their relative seniority already fixed under the then existing orders, with effect from 22.12.1959, permanent employees of a grade, including those confirmed in that grade prior to 22.12.1959, will rank en bloc senior non-permanent employees of that grade, irrespective of the fact whether such non-permanent employees were appointed to the grade before, on or after 22.12.1959. Amongst the permanent employees confirmed in the grade prior to 22.12.1959, their relative seniority already fixed according to the then existing orders would be maintained and they will rank senior to those confirmed in that grade after 22.12.1959. Amongst those confirmed after 22.12.1959, the relative seniority will be according to the order of confirmation. Similarly, amongst non-permanent employees of a grade, the relative seniority of those appointed prior to 22.12.1959 will be on the basis of the then existing orders but they will rank en bloc senior to those appointed to that grade after 22.12.1959, but not yet confirmed in the grade.

4. This matter, however, came up for consideration before the Supreme Court in Civil Appeals (1) No. 1845 of 1968 (Union of India and Others v. M. Ravi Varma and Others), (2) No. 1846 of 68 (Union of India and Others v. S. Ganapthi Kini and Others) and (3) No. 50 of 1969 (Union of India and Others v. Suresh Kumar and Others). In its judgment, dated 4.1.1972 (copy Annexure III) in these cases, the Court has not agreed with the view taken by the Ministry of Home Affairs (now Department of Personnel) in this matter, as outlined in para 3 above. The Court while dismissing the three appeals has held that, except in certain cases (with which the Court were not concerned), the general principles embodied in the annexure to the O.M. of 22.12.1959 did not have retrospective effect and could not apply to persons appointed to the various Central Services before that date. As a result of the judgment, the question whether, and if so, to what extent the seniority of persons appointed on a regular basis prior to 22.12.1959, which had been determined according to the O. M. of 22.6.1949 or office Memorandum No. 65/28/49-DGS (Apptts), dated the 3rd February, 1950, No. 31/223/50-DGS dated the 27th April, 1951, or No. 9/58/56-RPS dated the 4th August, 1956, but which had subsequently been revised according to the view taken in the matter vide para 3 above, should be revised further, has been examined in consultation with the Union Public Service Commission and it has been decided that in services/posts under the Central Government to which the general principles for determining eniority contained in the office memorandum of 22.12.1959 apply, seniority of such persons should, with effect from 4th January, 1972 (the date of the judgment of the Supreme Court) be restored as it stood on 21.12.1959 in the grade concerned, irrespective of the fact or date of their confirmation and such persons along with those appointed on a regular basis to the grade prior to 22.12.1959, shall continue to remain en bloc senior to the

persons appointed to the grade after 22.12.1959. The revision of seniority in such cases will not, however, affect the confirmations already made in the grade prior to 4th January, 1972 or regular promotions there from prior to that date. Confirmations/promotions made on or after 4th January, 1972 shall be reviewed, wherever necessary in the light of the above decision. If any person whose seniority is now revised according to these orders is still not confirmed, though a person junior to him has been confirmed, he may also now be considered, subject to availability of permanent vacancies in the grade, for confirmation in the grade, if he is otherwise eligible for the same and is suitable for it. Similarly if a person whose seniority is now revised under these orders was not considered for promotion prior to 4.1.1972, for want of the requisite seniority, he may also be considered for such promotion subject to availability of promotion quota vacancies in the higher grade, if he is otherwise eligible for the same. However, on promotion to the higher grade, the seniority of such persons among the promotees in the higher grade would be regulated in accordance with para 5 of the general principles of seniority contained in the annexure to Ministry of Home Affairs, office memorandum of 22.12.1959.

5. In this connection it may also be mentioned that the general principles of seniority contained in annexure to Ministry of Home Affairs. O. M. dated 22.12.1959 were applied to some services/posts from a date subsequent to 22.12.1959. Such a course was permissible, vide para 3 of the O. M. dated 22.12.1959 referred to above. If in those services posts, seniority was actually continued to be determined beyond 22.12.1959 in accordance with the instructions laid down in Ministry of Home Affairs' O.M. of 22.6.1949 seniority of the employees in the service/posts concerned might have been revised from the date from which the general principles of seniority contained in the annexure to the O.M. of 22.12.1959 were adopted in respect of those services posts on the basis of the interpretation of the Ministry of Home Affairs (now department of personnel) given para 3 above. In such cases also, the principle laid down by the Supreme Court would apply, viz., that seniority of persons appointed to the services/posts referred to above prior to the date of application of the principles contained in the O.M. of 22.12.1959, would continue to be governed by the rules/orders in force before such application. Hence the action suggested in para 4 above would apply pari passu to those cases as well.

6. Ministry of Finance, etc., are requested to take action accordingly in respect of Government employees serving in or under that Ministry.

(Sd.)

Harish Chandra

Under Secretary to the Government of India.

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To

All Ministries with usual number of spare copies. Department of the Government of India (including all attached and subordinate offices) under the Department of

Personnel.

Commissioner for Linguistic Minorities, Allahabad. Institute of Secretariat Training and Management, New Delhi.

D.G.E. & T.D.G., P&T and Bureau of Public Enterprises.

All Union Territory Governments/Administrations. All regular section of Department of Personnel.

No. 9/3/72-Estt. (D) Dated the 22nd July, 1972.

Copy with 10 spare copies forwarded to the Secretary, Union Public Service Commission with reference to the UPSC's letter No. F.2/14/72-S. II dated 5th May, 1972.

(Sd.)

Harish Chandra

Under Secretary to the Government of India.##

8. Each party before us relies upon the contents of an office memorandum as interpreted by this Court in Ravi Varma's case (supra). The case of the respondents, however, is that this Court did not have before it for consideration, in Ravi Varma's case, the effect of rights which may have been acquired by Central Government servants, other than the petitioners than before the Court by reason of earlier confirmations and promotions whether rightly or wrongly made. It is also urged that this Court was not then concerned with the correctness of the practical solution attempted by the memorandum of 1972, the validity of which is assailed by the petitioners before us now only on the ground that it incorrectly interprets the judgment of this Court in Ravi Varma's case but not on the ground that the Government did not have the power to lay down the correct principle for determining seniority by means of a decision or rule contained in an office memorandum. The petitioners, however, contend that the result of the misinterpretation by the office memorandum of 1972 of the decision of this Court in Ravi Varma's case is that the petitioners' rights under Article 16 of the Constitution are violated, whereas learned counsel for the respondents denies any such violation of a fundamental right irrespective of whether his contention, that the 1972 office memorandum correctly interprets judgment of this Court in Ravi Varma's case, is accepted or not.

9. As this Court had, in Ravi Varma's case (supra), set out the provisions of the memorandum of 22-6-1949 and 22-12-1959 in extenso, it is not necessary for us to reproduce their contents. We will only indicate the conclusions which emerged from their consideration in Ravi Varma's case. This Court had, after pointing out that the principles contained in the office memorandum of 22-6-1949, although intended originally to meet the situation created by the partition of India and the need to absorb the influx of a large number of new Central Government servants, whose seniority had to be determined, were more generally applied to all Central Government servants, proceeded to hold that the provisions of the memorandum of 1959 specifically stated that they were prospective and did not affect cases which were governed by the earlier office memorandum. The effect of the provisions of the office memorandum of 22-12-1959 was held to be that the new principle "could

not apply to the persons appointed to the various Central Services before the date of that memorandum". It was also observed there that this court had, even in Mervyn Coutinho v. Collector of Customs, Bombay ((1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749), held that the new principle of seniority contained in memorandum of 22-12-1959, was not to apply retrospectively. In fact, the so called new principle of 1959 was a restoration of a principle applied before the memorandum of 1949, issued to meet a special and unprecedented situation created by the influx of a large number of Government servants as a result of the partition of India. It may be observed here that the validity of the so called "new" principles of 1959 memorandum is not assailed before us on the ground that they, standing by themselves, violate Article 16(1) of the Constitution. Ravi Varma's case was decided on the assumption that the whole memorandum of 1959 was valid but had been misinterpreted and misapplied.

10. We find, from paragraph 4 of the memorandum of 1972, that, with effect from 4-1-1972, when this Court pronounced judgment in Ravi Varma's case (supra) the pre-1959 seniority of all persons was restored, or, in other words, it was to be governed by the 1949 memorandum irrespective of the fact or date of their confirmation and such persons along with those appointed on a regular basis to the grade prior to 22-12-1959 shall continue to remain en bloc senior to the persons appointed to that grade after 22-12-1959.

Nevertheless it is laid down there that this restoration of seniority will neither affect the confirmations already made in a grade nor promotions made therefrom prior to 4-1-1972. Evidently this was an attempt to recognise and preserve the rights, if any, of those already confirmed or promoted before 4-1-1972 so that these are not undone. The prospects, however, of confirmation, after due consideration of their cases, was held out to Government servants who were still not confirmed although their juniors had been so confirmed in grade provided that such Government servants satisfied eligibility tests. Similarly cases of those superseded by juniors in making promotions were to be considered afresh for promotion. Such consideration for confirmation or promotion was, however, made to depend on the existence of vacancies in the quotas for confirmation or promotion of Government servants.

11. It does appear to us that, in so far as memorandum of 1972 does not direct reconsideration of cases of all those persons who have actually missed confirmation or who were not considered at all for promotion at the time when they ought to have been considered, it fails to give due and complete effect, as a matter of general policy, to what was decided by this Court in Ravi Varma's case (supra). The excuse put foreword on behalf of the respondent is that rights said to be created by the actual facts of confirmations and promotions in the past cannot now be taken away by the respondents and that more persons cannot be introduced in any grade than its sanctioned strength. It is true that the petitioners were not parties to the decision in Ravi Varma's case so that they cannot claim the benefit directly of any direction given in the case It seems that it is for this reason that learned counsel for the respondents attaches considerable importance to delay in approaching this Court against alleged illegalities. We are unable to commend the argument, coming as it does on behalf of a department of the State, that the effect of the decision of this Court in Ravi Varma's case must be confined to parties before the Court in that case. We are, however, concerned here with the proceedings on the correct footing that the Central Excise Department was duty bound to give effect to the law declared by this Court in Ravi Varma's case. But, we may point out here that a mere failure to apply a rule which ought to have been applied may not, by itself, justify an invocation of the powers of this Court under Article 32 of the Constitution. In order to succeed in a petition under Article 32 of the Constitution the petitioner has to disclose how his fundamental right has been infringed by a particular rule or decision or its application. The impact of the rule or decision upon the facts of

each petitioner's case has to be clearly brought out.

12. In the cases before us, the fundamental rights alleged to be violated could only be the general ones embraced by Article 16(1) of the Constitution which reads :

> There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

Where a petitioner alleges that he has been denied equality of opportunity for service, during the course of his employment as a Government servant, it is incumbent upon him to disclose not only the rule said to be infringed but also how this opportunity was unjustifiably denied on each particular occasion. The equality of opportunity in a matter relating to employment implies equal treatment to persons similarly situated or in the same category as the petitioner. It postulates equality of conditions under which a number of persons belonging to the same category compete for the same opportunities and a just and impartial application of uniform and legally valid standards in deciding upon competing claims. It does not exclude justifiable discrimination.

13. If we examine the particular facts of the case of Amrit Lal Berry we find that there are ground for believing that such distinctions as were made in the matter of his confirmation and promotion as compared with those who joined service after him could have resulted from justifiable grounds of discrimination from the point of view of an application of Article 16(1) of the Constitution. Thus, as already indicated above, although, it appears, on the face of it, unjust that the petitioner Amrit Lal Berry, who is a B.A. and entered service on December 15, 1948, should be confirmed from July 1, 1955, but Narinder Singh, who is only a Matriculate and entered into service on February 7, 1949, should be confirmed from 1-7-1953 under orders of the Collector of Central Excise dated 5-5-1956; yet, this difference is explained by the uncontroverted assertion, in paragraph 3 of the counter affidavit dated 10-10-1973 of Shri N. Subramanian, Under Secretary, that the petitioner did not pass the prescribed departmental examination until November 1954. It appears that, the petitioner Amrit Lal Berry was confirmed as soon as he could reasonably be confirmed on the occurrence of a vacancy in the permanent cadre after he had passed his examination, as required by Rule 7 of the Departmental Examination Rules, made applicable on 25-6-1949 to all existing officiating and temporary Government servants in the Central Excise Department. He could not have, therefore, complained on that score. He has not shown that he was not treated as others in the same grade who had not passed the prescribed examination before confirmation. Indeed, he has not even impleaded Narinder Singh as an opposite party. He was confirmed as long ago as 1955. The real and only ground of his complaints seems to be that the imposition of a test as a condition precedent to confirmation had delayed his confirmation by two years. And, that was long before even the 1959 memorandum.

14. If the reason for the earlier confirmation of some persons, who obtained earlier promotions in the year 1970-71, is justifiable on grounds other than length of service, it is difficult to see how a petitioner in the position of Amrit Lal Berry could complain of any unjust treatment violative of Article 16(1) of the Constitution. One cannot find, in the petition, any ground for his assertion that he could have been confirmed or promoted earlier than those who entered service after him except that he entered service earlier But, to accept such a claim, built, on a bald and single ground, would be to overlook that confirmation, even according to the rules applicable in 1949, depended also on condition other than mere length of service. This aspect of the case was not involved in Ravi Varma's case (supra). At any rate, no party in that case seem to have relied on any rule or provision outside the two memoranda, one of 1949 and another of 1959, considered there.

15. Another grievance of the petitioner Amrit Lal Berry was that he was not given the senior grade of Inspectors with effect from 21-3-1961 but only from 8-12-1967. He attributes this result merely to his wrong place in the seniority list due to his delayed confirmation. At the same time, he asserts that, he crossed the efficiency bar on 12-6-1968. If crossing the efficiency bar was a condition precedent to getting the senior grade he was given that grade earlier than 1968. It is not clear, either from the assertions made by the petitioner or in the counter-affidavits, whether crossing the efficiency Bar was a condition precedent to entry into the senior grade or mere length of service was enough for this purpose. Neither the office memorandum of 1949 nor the petition of Amrit Lal Berry gives conditions of entry into the senior grade. It was for the petitioner to satisfy the Court that he was not given the senior grade although he satisfied all the required conditions of it and that others who were promoted into it, were given unjustifiable preference over him. It is difficult, on the assertions made in the affidavits before us, to see how the petitioner was denied equality of opportunity in not being given the senior grade in 1961 but only in 1967.

16. Even if we were to assume, as the petitioner would like us to do, that a disregard of seniority determined solely by length of service was the only reason for his failure to get the senior grade in 1961, there is yet another hurdle before the petitioner which was not shown to be present in Ravi Varma's case (supra), and, therefore, not considered or adjudicated upon in that case. There, no objection based on delay in applying to the Court was taken presumably because it could not be taken. But, a number 1959 and the filing of Amrit Lal Berry's petition in 1971, those who were so promoted and had been satisfactorily discharging, for considerable periods before the filing of the petition, their duties in a higher grade would acquire new claims and qualifications, by lapse of time and due discharge of their new functions no that they could not, unless relief had been sought speedily against their allegedly illegal confirmations and promotions, be equitably equated with the petitioner. The inequality in the equitable balance brought into being by a petitioner's own laches and acquiescence cannot be overlooked when considering a claim to enforce the fundamental right to equal treatment. To treat unequals equally would also violate that right. Although, it may not be possible for the State or its agents to plead an estoppel against a claim to the fundamental right to equal treatment, yet, if a petitioner has been so remiss or negligent as to approach the Court, for relief after an inordinate and un explained delay, he certainly jeopardises his claims as it may become inequitable, with circumstances altered by lapse of time and other facts, to enforce a fundamental right to the detriment of similar claims of innocent third persons.

17. Learned counsels for the opposite parties has relied on Rabindra Nath Bose v. Union of India ((1970) 2 SCR 697 : (1970) 1 SCC 84) where, because rights of persons who had benefited from allegedly illegal seniority rules for a long time would be disturbed, this Court dismissed a petition under Article 32 on the ground of inordinate delay in seeking relief. This Court said there (at p. 712) : [SCC p. 97, paras 32, 33]

It is said that Article 32 is itself a guaranteed right. So it is, but it does not follow from this that it was the intention of the Constitution makers that this Court should discard all principles and grant relief in petitions filed after inordinate delay.

We are not anxious to throw out petitions on this ground, but we must administer justice in accordance with law and principles of equity, justice and good conscience. 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 this appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years.

18. Learned Counsel for the petitioners has relied upon observations in a recent decision of this Court in Ramchandra Shankar Deodhar v. State of Maharashtra ((1974) 1 SCC 317, 325-326 : 1974 SCC (L&S) 137), where after considering earlier cases it was observed (at pp. 325-326) : [SCC (L&S) pp. 145-146, para 10]

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 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.

Rabindra Nath Bose's case (supra) was distinguished here on the ground that no rights, legal or equitable, of third parties had arisen by lapse of time in the case before the Court. The following Principle laid down in Tilokchand Motichand v. H. B. Munshi ((1969) 2 SCR 824 : (1969) 1 SCC 110) was also affirmed : [SCC p. 115, para 7]

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.

19. It is true that Amrit Lal Berry had amended his petitions so as to make it appear that a fresh cause of action accrued in his favour on 22-7-1972 when the office memorandum set out in full above was issued during the pendency of his writ petition, and the writ petition of K. N. Kapur and others purports to be directed against the office memorandum of 1972 consequential instructions Nevertheless, when we examine the contents of that office memorandum and the substance of the petitions before us, it becomes abundantly clear that what was being really sought by the petitioners was the setting aside of a number of confirmations and promotions which had taken place long before the writ petitions were filed without even making necessary assertion to indicate precisely the occasions on which allegedly illegal confirmations and promotions took place and of which person or persons exactly on each occasion. As we have pointed out above, at least those who had been promoted could, after a lapse of number of yeas in their new posts, be regarded equitably as persons in a new and separate class.

20. It is true that the concerned Central Excise Department officials would have known the correct legal position if they had cared to study the decision of this Court in Mervyn Coutinho v. Collector of Customs, Bombay (supra) which was pronounced on February 14, 1966. There this Court had pointed out, inter alia, that the memorandum of 1959 did not apply any new, principles retrospectively. That was primarily a case on the validity of the rotational system which was alleged to be struck by the principles of Articles 14 and 16(1) of the constitution. Even if the opposite parties had missed the significance of an observation in that case that the principles introduced by 1959 memorandum were not to be applied retrospectively on the terms of that memorandum itself, yet, Government servants who could benefit by this observation - probably they have an organisation to keep a watch over and protect their interests - ought to have also realised the meaning of this Pronouncement long ago. They could have raised the question in a writ petition in a representative capacity so that a general order could been obtained govern all similar cases. They need not have waited for the pronouncement of the law by this Court on 4-1-1972 in Ravi Varma's

case (supra). But whatever may be the consequences to parties affected by slumbering over their rights, we think that the Central Excise Department must be presumed to know the law as declared by this Court in Mervyn Coutinho's case in 1966. We find its lethargy in waiting until 1972 to make any attempt to rectify its errors far from commendable.

21. The memorandum of 1972 contains a set of instruction intended for carrying out the requirement of the law declared by the Court in Ravi Varma's case (supra) on 4-1-1972 without disturbing such equitable rights as may have occurred to other Government Servants by lapse of time. It is not suggested that this attempt was not a bona fide one. It had resulted in the conferment of such benefits from the declaration of the law in Ravi Varma's case, as could, in the estimation of Central Excise Department, be reasonably reaped by the petitioners. It could only be understood in the context of the past executive instruction and declarations of law by this Court.

22. It will be noticed that Ravi Varma's case (supra) was decided on an appeal from a decision of the High Court on writ petition under Article 226 of the Constitution. It was enough for the purposes of a petition under Article 226 to show a violation of an applicable rule of seniority laid down in the relevant executive instruction. But, we have writ petition under Article 32 of the Constitution before us for which violations of fundamental rights under Article 16(1) of the Constitution have to be satisfactorily shown.

23. Learned Counsel for the petitioner relied upon Union of India v. Vasant Jayaram Karnik ((1970) 3 SCC 658), to contend that violation of rule relating to seniority in a cadre or grade would be enough to base a claim for "relief on the footing that he denied equality opportunity". In that case, the selection for promotion was on the basis of "seniority-cum-merit"; and, it had been found that different standards had been applied in determining the seniority of the petitioners before the High Court as compared with the seniority of opposite parties before that Court. Hence the High Court had quashed the seniority list and its decision was upheld by this Court. Application of different and unjustifiable standards for determining seniority did, therefore, establish a clear violation of Article 16 of the Constitution in that case. In the case before us, this had not been demonstrated, although it may perhaps have been possible to show this if all the facts could have set out clearly with instances in which and the manner in which each petitioner had been wrongly suspended by contravening a principle flowing from or implied by Article 16(1) of the Constitution. However, as we have already found that the petitions are also liable to be dismissed on the ground that the equitable rights of a number of other Governments servants had come into existence by the laches and acquiescences of the petitioner, we need not proceed further to consider the question whether a violation of the fundamental right of the petitioners by the Central Excise Department was really and duly established here. On this view of the cases before us, it is also not necessary for us to decide the question whether there is any defect in the petition before us due to a misjoinder either of causes of action or of petitioners.

24. It may be mentioned here that an attempt was made by Amrit Lal Berry to account for delay in filing his petition. He said that he had made two departmental representations, one dated 6-3-1965 and another dated 13-8-1971, of which the filed copies, to which no replies had received so far by him. It was denied by the Excise Department that he ever sent the first representation. It is evidence that he had waited for a considerable period before making his representation in 1965 even if we were to assume that he did make such a representation then. Further more, the copy of the alleged representation of 1965 shows that it was directed only against the imposition of a test by examination before confirmation. We do not think that, merely by filing repeated or delayed representation a petitioner can get over the obstacles which delay in approaching the Court creates

because equitable right of other have arisen. We may, however, observe that when a citizen aggrieved by the action of a Government Department has approached the Court and obtained a declaration of law in his favour, others in like circumstance, should be able to rely on the sense of responsibility of the Department concerned and to expect that they will be given the benefits of his declaration without the need to take their grievances to court.

25. In the petition of K. N. Kapur that others, we do not even find an assertion that any representation was made against any violation of a petitioner's right. Hence, the rule recognised by this Court in Kamini Kumar Das Choudhary v. State of W. B. ((1972) 2 SCC 420, 426 (Para 11) : AIR 1972 SC 2060, 2065), that a demand for justice and its refusal must precede the filing of a petition asking for direction or writ mandamus, would also operate against petitioners.

26. It is submitted by the learned Counsel for the excise department that the real grievance of the petitioner is that they have not been awarded consequential benefits such as promotions and arrears of salary as a result of alleged wrong preparation of a seniority list in 1961. The memorandum of 1972 attempts to satisfy the grievance of the petitioners to the extent that it is reasonably possible consistently with the equitable rights of others, that the principle of length of service laid down in the 1949 memorandum should govern the cases of those appointed prior to 1959. We think that the 1972 memorandum may be fairly interpreted to mean that : (a) the 1949 memorandum will apply to cases covered by it till 1959 memorandum came into effect; (b) That those who were, in good faith and in the regular course, confirmed and/or promoted regularly though by an honest misapplication of the 1959 memorandum will not be disturbed even if they junior to the claimants under the 1949 memorandum; (c) that in future, for vacancies and quotas, as earlier explained those with longer service, as contemplated by 1949 memorandum, will be concerned for confirmation and promotion; and (d) that in the subsequent career of those who stand to benefit by the 1959 memorandum, the factor will be reckoned in their favour when further opportunities for promotion arise, so that they may not suffer for ever from the misconstruction of the memorandum made by the Excise Department. It will be for the Department to consider what consequential benefits can be given as a result of reconsideration of a case.

27. Lastly, it was urged that the fixation of 4-1-1972 as the date after which all confirmation and promotion made would be revised in order to conform to the seniority determined by length of service of persons appointed prior to 22-12-1959 was arbitrary, Reliance was placed upon D. R. Nim v. Union of India ((1967) 2 SCR 325 : AIR 1967 SC 1301 : (1968) 1 LLJ 264), where a date fixed for the application of particular rule was held to be arbitrary. In reply it was submitted that 4-1-1972 was the date on which this Court delivered judgment in Ravi Varma's case (supra), making it finally clear and definite to the Central Excise Department what the correct interpretation of memorandum of 1959 was, and, therefore, the date had not been chosen altogether arbitrarily. A perusal of the memorandum of 1972 shows that the date 4-1-1972 was only chosen for giving the retrospective effect to whatever may be the actions taken on wrong view of the law after this date. In other words, it means the promotions and confirmation made after 4-1-1972 would, in any case be reopened. The provisions of the memorandum, which are not very clear as to what will happen in decisions taken before 4-1-1972 by the Excise Department, have been now interpreted by us so that they may be construed in a manner consistent with the apparent objects of the memorandum. The result seems to be that the seniority of all unconfirmed persons is to be determined in accordance with the law as declared by this Court on 4-1-1972; but, as regards persons who already been bona fide confirmed or promoted before 4-1-1972 no undoing of what had already been done in their favour would be possible. Nevertheless, it was laid down there that the cases of those who failed to either considered for confirmation or promotion merely because of the failure to apply the length of

service rule for determinating seniority, would not suffer but will be reconsidered now subject to existence of vacancies in the grade for confirmation, or in the promotion quota.

28. We are not quashing any part of the memorandum of 1972 as we do not so interpret it as to make it possible for the Central Excise Department to violate Article 16(1) of the Constitution by resorting to it. We take its meaning to be and, so construed, it will be constitutional that the declaration of law by the Court on 4-1-1972 will affect all cases in which the principle of 1949 memorandum can still be applied despite any confirmation wrongly made between 1959 and 4-1-1972. It appears to us that, in cases of promotion wrongly made between 1959 and 4-1-1972, the position, dispute the clarification by us is still left rather vague. As no question of the seniority of a person actually promoted before 4-1-1972 as against that of a person promoted after 4-1-1972 is before us, on the footing that both belong to the class of promotees whose seniority, inter se, should be determined by the total lengths of their services, we refrain from pronouncing upon such questions. We hope that just and reasonable rule for determining such questions of seniority, on principle of length of service combined with merit, will be evolved by the Excise Department itself to prevent complaints to injustice and future litigation. It is for the Central Excise Department itself to make appropriate rules. It is only when such rules violate or have been so used as to violate the fundamental rights of any groups of persons employed by the State that this Court can interfere. In such cases, we see no objection to the filing of writ petitions in representative capacities by aggrieved person after taking necessary steps under Order 1, Rule 8, Civil Procedure Code, the application of which to proceedings under either Article 226 or 32 of the Constitution does not appear to us to be barred any provision.

29. It is difficult to understand why statutory provisions, on the lines on which provisions have been made for superior services and rules under such provisions are not made to ensure that nothing except just consideration, such as merit tested by performance and integrity revealed by the service records or other reasonable tests as well as length of service can count in making confirmation or promotion. The petitioners have, however, failed to establish that just and reasonable considerations did not prevail in any particular instance brought to our notice.

30. Consequently, we dismiss these writ petitions, but, in the circumstance of these cases, parties will bear their own costs.

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