

SUPREME COURT OF INDIA

I. Chuba Jamir

Vs.

State of Nagaland

(Tarun Chatterjee and Aftab Alam JJ.)

17.07.2009

JUDGMENT

Aftab Alam, J.

1. Leave granted.

2. Appellant no.1, I. Chuba Jamir was writ petitioner no.2 before the High Court, appellant nos. 2 to 2/4 are the heirs and legal representatives of writ petitioner no.3 who died in the course of litigation before the High Court and appellant no.3 Vilapral Aja was writ petitioner no.4 before the High Court. Appellant No.1 is reported to have retired during the pendency of the appeal.

3. The two appellants and the deceased writ petitioner sought to challenge the appointment/promotion of respondent No.3, who was earlier posted as Statistician-cum-Economist in the PWD and Housing department, as Assistant Director in the Nagaland Economics and Statistical Service as a consequence of the encadrement of the post held by him in the PWD and Housing department with the E S Service. They also challenged the tentative gradation list of the officers of the Service issued on October 26, 1998 in which respondent No. 3 was placed above them.

4. Appellants 1 and 3 and writ petitioner No. 3 (since deceased) were all appointed as direct recruits, through Nagaland Public Service Commission as Statistical Officer (Class II Gazetted) in the Economics and Statistical Service of the State. Writ petitioner No. 3 was appointed on June 21, 1984 and appellants 1 on June 28, 1984. On July 25, 1990 five posts of Assistant Directors fell vacant when incumbents on those posts were promoted as Deputy Directors (Class I Gazetted) in the Directorate of Economics and Statistics. According to the appellants, by that time they had completed more than five years in service and were otherwise eligible for promotion as Assistant Directors in terms of the Nagaland Economics and Statistics Service Rules. They were, however, not considered for promotion at that time.

5. On February 2, 1988, on the recommendation of the Public Service Commission, the 3rd respondent was appointed to the post of Statistician-cum- Economist (Class I Gazetted) in the department of PWD and Housing. There being no avenues for his promotion in the

department of PWD and Housing he made representations for transferring him along with the post to the State Economics and Statistical Service, giving an undertaking in writing that he would not claim the benefit of past service for the purpose of seniority. On December 21, 1992 the Government of Nagaland in the department of Planning and Co-ordination issued an order conveying the approval of the Governor of Nagaland to the encadrement of the post of Statistician-cum-Economist (Class I Gazetted), Traffic Engineering Cell, under the department of Works and Housing Nagaland, created on 17.3.1980, with the Nagaland Economics and Statistics Service along with the incumbent Shri Y. Sacheo Ovung in the cadre of Assistant Director in the pay scale and with all other allowances admissible to that post. The order further stated that Y. Sacheo Ovung (respondent No. 3) was accordingly transferred to the department of Economics and Statistics but consequent upon the encadrement he would have no claim of seniority over the other officers already posted as Assistant Directors (E/S). His seniority in the cadre of Assistant Director (E/S) would be counted from August 13, 1992. He was posted in the department of Works and Housing as Assistant Director (E/S) with immediate effect. The order further stated that it was issued with concurrence of the Governor's Executive Council vide Agenda No.8 dated August 13, 1992.

6. Later on in supersession of this order a Notification was issued on October 27, 1993 that reads as under:

“NOTIFICATION

No.STAT/P-17/92 Dated Kohima, the 27th Oct. 1993

In supersession of this Department's order of even number dated 21.12.1992 the Government of Nagaland is pleased to encader the Services of Shri Y.S.Ovung Statistician-cum-Economist, Department of Works and Housing as Assistant Director in the Directorate of Economics and Statistics in the scale of pay Rs.1175-50-1775-EB-50-1975-55-2305/-p.m. (Class I Gazetted) Plus Innerline compensatory Allowance 25% of the basic pay and all other allowances as are admissible under the Rules issued from time to time w. e. f. 13.8.1992 subjected to the following conditions:-

1. His seniority in the new cadre shall be counted w.e.f. 13.8.1992 only.
2. His pay in the new cadre shall be fixed under the provisions of F.R. 22-C.
3. Shri Y.S. Ovung has been posted to the Department of Works and Housing as Assistant Director (E/S) with effect from 21.12.1992.
4. This issues with the concurrence of the Governor's Executive Council vide Agenda No.8 of No.CA8-34/92dated 13.8.1992 and clearance of P and A.R. vide their U.O. No.2826 dated 6.10.1993.”

7. On August 6, 1996 respondent No.3 was promoted to the post of Deputy Director in officiating capacity. On the same date appellants 1 and 3 and writ petitioner no.3 were promoted as Assistant Directors. On October 26, 1998 a tentative seniority list of officers of the Economics and Statistical Service was circulated in which respondent No.3 was shown at serial No.7 and the writ petitioners were shown below him. The two appellants and the deceased writ petitioner spent the next two years in filing departmental representations and finally approached the Gauhati High Court by writ petition being W.P. (C) No.22(k)/1999, in substance challenging the respondent's encadrement as Assistant Director in the State Economics and Statistical Service that took place about 7 years ago in the years 1992-93. The writ petition was opposed by the State and respondent No.3 on the plea that it was a case of encadrement which was a matter of policy decision by the Government. Moreover, the writ petitioners had sat over the matter for more than 7 years and the writ petition was, therefore, liable to be rejected on grounds of delay and laches alone. A learned Single Judge of the High Court disposed of the writ petition by judgment and order dated July 14, 2000 with a number of directions in favour of the writ petitioners. The learned Single Judge accepted the case of the State that the encadrement of the post of Statistician-cum-Economist in the department of PWD and Housing along with its incumbent, respondent No. 3 with the State's Economics and Statistical Service was effected after due consultation with the concerned departments and with the approval of the Nagaland Public Service Commission. Further the decision of encadrement was taken at the highest level in the State Government. The learned Single Judge concluded that the decision of encadrement having been taken by the highest authority in the government of the State no interference in the matter was called for. The learned Single Judge also noted the contention on behalf of the respondents that the matter was being agitated after about 7 or 8 years and any interference at that stage would lead to a lot of dislocation. But he did not make any pronouncement on that issue whether for that reason the writ petition was liable to be dismissed or whether in the facts of the case the delay of seven or eight years was of no consequence. From this stage the learned Single Judge went on to hold that vacancies in the post of Assistant Director had arisen in the year 1990 itself when the writ petitioners were already eligible for promotion to that post. He further observed that had they been promoted as Assistant Directors in 1990 they would have ranked senior to respondent No.3. On that reasoning he directed that the writ petitioners should be deemed to have been promoted to the posts of Assistant Director notionally one day prior to the date on which respondent no.3 was appointed/promoted as Assistant Director. He further directed that the inter se seniority of the writ petitioners and respondent no.3 should be re-fixed accordingly. Further, following the redetermination of their inter-se seniority the post of Deputy Director, then held by respondent No. 3, would be filled up on regular basis taking into consideration the writ petitioners with their restored seniority.

8. Against the judgment and order passed by the learned Single Judge respondent No.3 filed an internal court appeal being Writ Appeal No. 347 of 2000 which was allowed by judgment and order dated December 20, 2004 passed by a Division Bench of the High Court. The Division Bench noted that in 1992 when respondent No. 3 came to the Economics and Statistical Service as Assistant Director following the encadrement of his post held in the PWD and Housing department with the Economics and Statistical Service the writ petitioners

were working as Superintendents and, therefore, there was no question of their deemed promotion as Assistant Directors one day prior to the date respondent No. 3 came to that post. It, accordingly, allowed the appeal observing as follows:

“The order of encadrement dated 21.12.1992 has been challenged in the writ petition filed in the year 1999 by the writ petitioners who were working as Superintendents on 21.12.1992. They were promoted to the post of Assistant Director by orders passed on 6.8.1996 i.e. about four years after encadrement and appointment of the appellant to the post of Assistant Director. Obviously, the private respondents cannot claim seniority over the appellant who had joined as Assistant Director much earlier in point of time.”

9. Mr. P. K. Goswami, learned Senior Advocate appearing for the appellants took us through the different provisions of the *Nagaland Economics and Statistics Service Rules, 1973*. Learned counsel submitted that Schedule-II of the Rules provides that the post of Assistant Director in the E S Service would be filled up only by promotion and the eligibility and other conditions for promotion to the post is five years in continuous service as Statistical Officer/District Statistical Officer. Mr. Goswami submitted that in 1990 when vacancies arose in the posts of Assistant Director in the E S Service the appellants and the deceased writ petitioner had completed 5 years continuous service as Statistical Officers and were eligible for the promotion. Nevertheless, they were denied promotion and respondent no.3, who was in another government department, was promoted as Assistant Director and brought in to the E and S Service above the appellants and the deceased writ petitioner.

10. Mr. Goswami then referred to the method of recruitment under Rule 5 which earlier provided as follows:-

“5. Method of recruitment:

(1) Recruitment to the service shall be made by any or all of the following a) by direct recruitment

b) by promotion of persons of lower grade and

c) by permanent/temporary transfer or selection of personnel employed under the Government.

Clause (C) of Rule 5 was deleted by Notification issued in December 1976 and thereafter, learned Counsel contended, it was no longer permissible to fill up the post of Assistant Director by transfer or selection of a person employed in any other government department.”

11. Mr. Goswami also referred to Rule 14 dealing with `Seniority and Rule 16 dealing with Gradation List that provides as follows:- There shall be prepared every year of (sic) a gradation list consisting of the names of all members of the service arranged in the order of

seniority. Learned Counsel submitted that the expression all members of the service had a legal connotation and it would include only those who were validly appointed in substantive capacity under the provisions of Rule 5 read with Schedule-II. (In support of the submission he relied upon an observation made in a decision of this Court in *State of U.P. vs. Rafiquddin and Others*¹. He submitted that since the appointment/promotion of respondent No.3 on the post of Assistant Director was not made validly and legally, he could not be considered as a member of the service and his name could not figure in the gradation list, much less above the two appellants and the writ petitioner.

12. Mr. Goswami next submitted that the Division Bench of the High Court was patently in error in non-suiting the two appellants and the deceased writ petitioner on grounds of delay and laches. He submitted that the learned single Judge of the High Court had entertained and adjudicated upon their claims on merits and had given them material reliefs. It was, therefore, no longer open to the Division Bench to throw out their case on grounds of delay and laches. In support of the submission he relied upon a number of decisions but we need take note of only some of them.

13. In *R.S. Deodhar vs. State of Maharashtra*², it is indeed true that this Court entertained a writ petition filed under Article 32 of the Constitution after ten or twelve years of the accrual of the cause of complaint and granted suitable reliefs to the petitioners but from paragraph 9 of the judgment it appears that there was ample justification for the delay by the petitioners in coming to the Court. Further, paragraph 9 of the judgment made it very clear that the Rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. In other words, whether or not delay and laches would be fatal to the claim of the seeker would depend a great deal on the facts and circumstances of each case. The decision in *R.S. Deodhar* certainly does not lay down an inviolable rule that once a writ petition is entertained on merits the appellate court is powerless in going into the questions of delay and laches, the conduct of the writ petitioner(s) and the consequences of granting the reliefs sought for at the highly belated stage.

14. *Hirday Narain vs. Income Tax Officer, Bareilly*³ was a case arising under the Income-Tax Act and the issue in that case was not delay or laches but the availability of an alternative remedy to the appellant. The decision has no application to the facts of the present case.

15. *L. K. Verma vs. HMT Ltd. and Another*⁴, was a case of removal from service of an individual employee and the issue before the Court (in paragraph 21 of the judgment) was not delay or laches but the existence of alternative remedy.

16. *Kanak (Smt) and Another vs. U.P. Avas Evam Vikas Parishad and Others*⁵, was a case arising from a land acquisition proceeding and in that case also the issue was not delay or laches but the existence of alternative remedy.

17. On a careful consideration of the materials on record and the submissions made by Mr. Goswami we are unable to accept the claims of the appellants-writ petitioners. In our view

the inordinate delay of 7 or 8 years by the appellants-writ petitioners in approaching the High Court was a very valid and important consideration. This aspect of the matter was also brought to the notice of the Single Judge but he proceeded with the matter without saying anything on that issue, one way or the other. It was, therefore, perfectly open to the Division Bench to take into consideration the conduct of the appellants-writ petitioners and the consequences, apart from the legality and validity, of the reliefs granted to them by the learned single Judge.

18. Moreover, we find that the submissions of Mr. Goswami are based on the premise that respondent no.3 was brought to the post of Assistant Director in the E and S Service of the State by giving him promotion. This basic premise is unfounded. It was not a case of promotion at all but it was a case of merger of the post held by him in the department of PWD and Housing with the post of Assistant Director in the E and S Service of the State. In the interest of administration it is open to the State Government, as a matter of policy, to bring about merger of posts/cadres and, ordinarily, the matter does not want any interference by the Court. (See: *Vinay Kumar Verma and Others vs. State of Bihar and Others*⁶, *S.P. Shivprasad Pipal vs. Union of India and Others*⁷).

19. We may also add here that the validity and legality of the Government Order and the Notification effecting the encadrement of the post held by respondent no.3 in the PWD and Housing Department with the E and S Service does not seem to have been squarely challenged before the High Court. One can understand that the Court, on scrutiny, might find that the encadrement was wrong and illegal. In that case the Court would undoubtedly strike down the encadrement resulting in the posting of respondent No. 3 as Assistant Director in the E S Service notwithstanding the fact that the decision was taken at the highest level in the government and the notification was issued with the approval of the highest government functionary. But the learned Single Judge accepted the validity of the encadrement and yet proceeded to direct the deemed promotion of the appellants-writ petitioners as Assistant Directors from a date prior to the appointment of respondent no.3 as Assistant Director. The only ground for passing such extra ordinary order was that when vacancies arose in the post of Assistant Director the appellants-writ petitioners were eligible for promotion. It is elementary and well settled that mere eligibility does not confer any right for promotion. The direction of the learned Single Judge, viewed from any angle was unsustainable. The Division Bench was perfectly right in setting aside the order of the learned Single Judge.

20. In the light of the discussions made above, we find no merit in this appeal. It is accordingly dismissed but with no order as to costs.

¹AIR 1988 SC 162 (172)
⁵(2003) 7 SCC 693

²AIR 1974 SC 259
⁶(1990) 2 SCC 647

³AIR 1971 SC 33
⁷(1998) 4 SCC 598

⁴(2006) 2 SCC 269