

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH**

**MISC APPLICATION NO.76 OF 2020
IN
ORIGINAL APPLICATION NO.465 OF 2019
WITH
ORIGINAL APPLICATION NO.465 OF 2019**

DISTRICT : MUMBAI

Mr. Shyamal Kumar Mukherjee)
Retired Secretary, Public Works)
Department, Mantralaya, residing at)
1502, Glen Ridge, Hiranandani Garden)
Powai, Mumbai 400 076) **...Applicant**

Versus

1. The State of Maharashtra)
Through the Chief Secretary,)
General Administration)
Department, Mantralaya,)
Mumbai 400 032.)
2. The Additional Chief Secretary,)
Public Works Department,)
Mantralaya, Mumbai 400 032) **...Respondents**

Shri D.B Khaire, learned with Ms Pradhan, learned advocate for the Applicant.

Shri A.J Chougule, learned Presenting Officer for the Respondents.

**CORAM : Justice Mridula Bhatkar (Chairperson)
Mrs Medha Gadgil (Member) (A)**

DATE : 16.02.2022

PER : Justice Mridula Bhatkar (Chairperson)

J U D G M E N T

1. The present Misc Application seeking delay is heard along with preliminary issue of limitation which is also raised by way of defence by the Respondent-State in the Original Application.

2. The issue of limitation in the application for condonation of delay in the Original Application are interlinked and therefore, both the Misc Application seeking condonation of delay and the Original Application are heard together on preliminary issue as follows:-

Whether the Original Application is barred by law of limitation?

Under Section 21 of the Administrative Tribunals Act, 1985, the time to file an application before the Tribunal is one year from the date of cause of action.

3. The applicant seeks relief by way of declaration that the placement of the applicant at Sr No. 81 below that of Shri Dhananjay Dhawad in the final seniority of the cadre of Superintending Engineer published on 9.3.2015, is arbitrary, unreasonable and contrary to law. He also seeks directions that the decision of the Respondents dated 3.2.2015, thereby rejecting the representation submitted by the applicant dated 17.11.2014 and also he is to be given deemed date of promotion to the post of Secretary, P.W.D as on 23.7.2009, when Shri Dhananjay Dhawad

was promoted as Secretary, P.W.D. It is further prayed that the provisional seniority list dated 16.8.2013, wherein Shri Dhananjay Dhawad is shown above the applicant also be quashed and set aside. It is further prayed that the delay of 49 days caused by the Respondents to issue the order of promotion of the applicant to the cadre of Secretary is not attributable to the applicant and therefore, it is to be held that he is eligible to get promoted to the cadre of Secretary w.e.f 30.11.2009 and he is to be considered eligible for the post of Secretary in the meeting of the Establishment Board held on 26.11.2009.

4. This is a second round of litigation by the applicant to approach this Tribunal. Earlier, the applicant has filed Original Application No. 933/2015 against the Respondents for the same relief. The said Original Application was withdrawn on 12.12.2018. However, liberty was granted to file fresh Original Application and it was observed as under:-

“O.A stands withdrawn with liberty to file fresh O.A, subject to point of limitation. No order as to costs.”

5. Thereafter, the present Original Application No. 465/2019 was filed on 6.5.2019 along with application seeking condonation of delay, making specific averment that there is no delay in filing the present Original Application. However, if any delay is there, it is to be condoned. The Respondents have filed reply to this Original Application opposing the application for condonation of delay in view of the earlier order dated 12.12.2018 of this Tribunal.

6. While allowing the withdrawal of the earlier O.A No. 9332/105, the Division Bench has made certain observations. We need to reproduce the same as they are relevant on the point of limitation.

“3. *It is the case of the applicant that his posting to the post of Secretary was delayed and therefore he could not complete five years’ service on post of Secretary due to shortfall of 18 days for such completion. It is not shown as to why the Applicant did not immediately challenge his late appointment order to the post of Secretary. Prima face, we are of the view that the applicant is not entitled to be considered for the post of Principal Secretary since he has not completed five years’ service on the post of Secretary.*

4. *Learned advocate Shri M.R Patil for the applicant submits that the applicant was in fact recommended for the post of Secretary in 2009 through Departmental Promotion Committee meeting, but the order was issued late. However, this aspect cannot be considered in this O.A. Learned advocate submits that he may be permitted to withdraw the O.A with liberty to file necessary documents and file fresh O.A.*

5. *We however make it clear that filing of fresh O.A will be subject to merits on the point of limitation that may arise in the said O.A. Since applicant wants to withdraw the O.A. we pass the following order:-*

O R D E R

O.A stands withdrawn with liberty to file fresh O.A, subject to point of limitation. No order as to costs.

7. Thus, the earlier bench has in fact held that he could not complete five years as a Secretary due to shortfall of 18 days so could not be promoted. Therefore, though the learned counsel for the applicant has sought the withdrawal of the Original Application with liberty to file fresh O.A, the Division Bench has recorded their prima facie findings.

8. Learned Presenting Officer Mr Chougule has vehemently raised the point of limitation in filing the Original Application.

Hence, fixation of the date of cause of action is not possible unless we deal with certain facts on merits, which are pleaded in the Original Application. Hence, we formulated the preliminary issue of limitation while deciding the application for condonation of delay in the Original Application.

9. We would like to state the facts in brief:-

The applicant has retired on 31.12.2014 from the post of Secretary, P.W.D. He was promoted to the post of Secretary on 18.1.2010. However, he seeks deemed date of promotion to the post of Secretary from 30.11.2009 or when Mr Dhananjay Dhawad was promoted to the post of Secretary on 23.7.2009. As per G.R dated 2.7.2004, Officer holding the post of Secretary is eligible for promotion to the post of Principal Secretary, provided the officer fulfills the criterion of work experience of minimum 5 years' as Secretary and also satisfies the criterion as regards A.C.R with minimum grade as 'very good'. The applicant unfortunately fell short of 18 days who had tenure of Secretary from 18.1.2010 to 31.12.2014. The applicant, thereafter, approached this Tribunal seeking deemed date of promotion which was given to Mr Dhananjay Dhawad, so that he can make a good off 18 days by securing the earlier date of promotion.

10. Learned counsel Mr Khaire has placed chronology of the promotion orders of the applicant and Mr Dhawad. The applicant and Mr Dhawad both joined the service in October, 1980 as Assistant Engineer (I) and were selected from the State cadre through M.P.S.C. Both of them were promoted to the post of Executive Engineer, P.W.D in November, 1984. Admittedly, Mr Dhawad was senior to the applicant when MPSC recommended the names in 1980. The seniority was maintained till October, 1989.

The applicant was promoted to the post of Superintending Engineer on the recommendations of the Establishment Board Meeting held on 21.8.189. However, Mr Dhawad was not considered as his A.C.Rs were not found satisfactory at the relevant time. Thereafter, Mr Dhawad was promoted temporarily to the post of Superintending Engineer on 24.2.1993. Thus, learned counsel Mr Khaire contended that the applicant superseded Mr Dhawad in the year 1989 and he was senior to Mr Dhawad in the seniority list. Thereafter, the applicant and Mr Dhawad were promoted to the post of Chief Engineer n 30.6.2003. Learned counsel Mr Khaire submitted that till then the applicant was not aware of the seniority list as the seniority list was published on 16.8.2013. Thereafter, the applicant objected to the provisional seniority list published on 16.8.2013, by submitting representation dated 22.8.2013. However, it was rejected on 3.2.2015. Learned counsel for the applicant submitted that the rights of the applicant were crystalized on the point of his seniority in March, 2015, so the cause of action arose. He further submitted that the applicant bonafide believed that he is senior due to promotion as Superintending Engineer on 30.10.1989, nearly three years prior to the promotion of Mr Dhawad, who was promoted on 24.2.1993 to the post of Superintending Engineer.

11. Learned counsel Mr Khaire further submitted that the applicant and Mr Dhawad, though were promoted to the post of Chief Engineer on 30.6.2003, there was no opportunity for the applicant to have knowledge of the seniority list as the provisional seniority list was first published in August, 2013 and the final seniority list was published on 9.3.2015. Learned counsel submitted that immediately thereafter the applicant filed O.A 933/2015. However, the said Original Application was withdrawn because the minutes of the meeting of the Establishment Board

was not in possession of the applicant and he wanted to procure the same under R.T.I. After procuring the minutes of the Establishment Board, he filed the present Original Application without delay. Learned counsel further submitted that the applicant should have been considered in the meeting of the Establishment Board which was held in June, 2009, as the applicant is having fundamental right to be considered for promotion. However, the applicant was not considered at the relevant time though he was senior to Mr Dhawad and thus suffered injustice and thereafter consequently missed his chance to become Principal Secretary as he fell short of 18 days to fulfill the criterion of minimum 5 years of service in the rank of Secretary. Hence, there is no delay and the Original Application is filed within time and the applicant is not responsible for the delay, if any.

12. Learned counsel for the applicant Mr Khare, relied on the judgment of the Hon'ble Supreme Court in **UNION OF INDIA & Ors Vs. TARSEM SINGH (2008) 8 SCC 648**, where the delay claiming disability pension was claimed by the applicant against the Indian Navy. The Hon'ble Supreme Court held as under:-

“7. To summarise, normally a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is abed on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But

there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue related to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied.”

13. We have considered the case of **TARSEM SINGH (supra)** wherein the Hon'ble Supreme Court has held that belated service related claim will be rejected on the ground of delay and laches. However, there are exception to the rule where there is a continuing wrong and in such service related claims, relief can be granted even if there is a long delay in securing remedy, if this continuing wrong creates continuing source of injury. We are of the view that the ratio laid down in the above case is not helpful to the applicant because there is no continuing wrong. The cause of action is fixed when the applicant was given the order of promotion on 18.1.2010. Moreover, every Government servant is aware of his date of birth so the date of retirement. Thus, the applicant was appointed on promotion to the post of Secretary on 18.1.2010 and he had knowledge and aware that he was going to retire on 31.12.2014. Further, in view of G.R dated 2.7.2004, he was also aware that he was not able to fulfill the criterion of minimum 5 years of service in the rank of Secretary, so he could not be promoted as Principal Secretary. Thus, according to him the wrong occurred on that day. Thus, his appointment order was delayed by more than a month and therefore he could not get the fruit of the

tenure of Secretary to get promoted to the post of Principal Secretary.

14. Learned P.O relied on the affidavit in reply dated 4.2.2022 filed by Under Secretary, P.W.D, Mantralaya, Mumbai. Learned P.O submitted that Mr Dhawad was senior from the beginning right from the date of his appointment. In between the applicant was given promotion to the post of Superintending Engineer prior to Mr Dhawad. However, it was a temporary promotion and Mr Dhawad who was promoted to the post of Superintending Engineer in the year 1993, was also initially promoted temporarily. Thereafter when the orders of regular promotion to the post of Superintending Engineer were issued by the Respondents, both the applicant and Mr Dhawad were found eligible. Therefore, seniority of Mr Dhawad and the applicant was maintained thereafter while issuing the orders of Mr Dhawad and the applicant to the post of Superintending Engineer on 11.7.1994.

15. Learned P.O has further pointed out the minutes of the meeting of the Establishment Board which was held on 26.11.2009 and in the said meeting it was mentioned that three posts of Secretary are sanctioned in P.W.D and all the posts are filled up by promotion. As on 30.11.2009, one post is going to be vacant and therefore, the proposal is submitted by the department to fill up from the open category by promotion. But it is mentioned in the minutes that after obtaining approval from G.A.D, the present applicant Mr S.K Mukherjee is found eligible to be promoted to the post of Secretary and his name is recommended. Learned P.O further submitted that as one post of Secretary fell vacant in July, and therefore the name of Mr Dhawad was recommended for promotion and he was also promoted. Learned P.O submitted that

the applicant has no case especially at all on merits, much less on the point of limitation and hence the applicant be dismissed.

16. The chronological development in the appointment and promotion of the applicant and Mr Dhawad are noted down in the argument of the learned counsel for the applicant and the learned P.O. Admittedly, Mr Dhawad was senior to the applicant. Though, the applicant was appointed in the year 1989 to the post of Superintending Engineer and Mr Dhawad was appointed later in February, 1993 to the post of Superintending Engineer, that was a temporary promotion and their promotions were regularized in the year 1994, this fact that was not disclosed by the applicant. Thus, the important step of regular promotion was eliminated by the applicant while putting his case. However, the said gap is bridged up by the learned P.O after obtaining necessary instructions from the office of the P.W.D.

17. On perusal of the record, we found that there were three posts of Secretary and the post can be filled up only if the vacancy is available. The minutes of meeting dated 26.11.2009 clearly discloses that one post out of three was to fall vacant on 30.11.2009 and in that place name of the applicant, who was shown in the merit at Sr. No. 2 was recommended. At the relevant time, Mr Dhawad was shown as Secretary who has attended the said meeting on the request of the Establishment Board. Thus, there is confirmation about the seniority between Mr Dhawad and the applicant. No injustice has taken place while appointing Mr Dhawad and the applicant.

18. We find that the seniority of Mr Dhawad in fact was fully within the knowledge of the applicant. When Mr Dhawad was appointed to the post of Secretary in July, 2009, the applicant

definitely had knowledge that Mr Dhawad had superseded him. If the applicant was having a belief that he is senior to Mr Dhawad, though factually he was not, that was in fact cleared when Mr Dhawad was promoted to the post of Secretary. We cannot stretch the period of cause of action from 2009 to 2015. The knowledge of the fact situation is decisive factor to determine the period of cause of action. We are unable to accept the submissions of the learned counsel for the applicant that he was not aware of his seniority as seniority is a very sensitive and important subject for all the Government servants as it is a promotional avenue. It is difficult for us to accept that the applicant bonafide believed that he was senior to Mr Dhawad after 1989, when he was promoted to the post of Superintending Engineer.

19. In fact, the applicant is not concerned with the deemed date of Mr Dhawad, but he wants to make good off the 18 days which he fell short to fulfill the eligibility criteria to become Principal Secretary. Had he been given the appointment by promotion to the post of Secretary in middle of December, 2009, instead of 18.1.2010, the applicant would not have come to this Tribunal agitating his grievance of seniority between him and Mr Dhawad and seeking deemed date of promotion of Mr Dhawad, i.e. 23.7.2009.

20. Thus, the real grievance of the applicant is elsewhere, i.e. falling short of 18 days in order to reach that eligibility criteria of completing 5 years in the post of Secretary for promotion to the post of Principal Secretary, this entire facade of seniority of Mr Dhawad is created. The applicant has retired as Secretary, P.W.D. We took into account his earlier attempt of filing Original Application and the order passed by our predecessors and we express that the applicant should not have filed this Original

Application which has unnecessarily taken the time of the Tribunal.

21. We dismiss both the Misc Application and the Original Application and impose cost of Rs. 10,000/- on the applicant for filing such chance litigation to be deposited in the account of Registrar, M.A.T, Mumbai.

Sd/-
(Medha Gadgil)
Member (A)

Sd/-
(Mridula Bhatkar, J.)
Chairperson

Place : Mumbai
Date : 16.02.2022
Dictation taken by : A.K. Nair.