* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P. (C) No. 7867/2002**

% Reserved on: 19th July, 2012
Decided on: 26th July, 2012

UNIVERSITY OF DELHI ..... Petitioner
Through: Mr. Pawan Kumar Aggarwal, Adv.

versus

OM PRAKASH & ANR. ..... Respondents
Through: Mr. Anuj Aggarwal, Adv. for R-1.

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition the Petitioner assails the impugned award dated 9th May, 2001 whereby the Promotion Committee of the Petitioner was directed to consider the case of the workman for his promotion with consequential benefits as Assistant and Senior Assistants from the dates his juniors have been promoted.

2. The facts in brief are that Respondent No.1 was appointed as a Library Attendant on 4th October, 1963. He was promoted to the post of Clerk-cum Typist on 17th June, 1966 followed by a promotion to the post of Assistant on 23rd June, 1973, though Respondent No.1 claims to have been promoted as Assistant on 17th January, 1973. In January 1991 Respondent No.1 was promoted as Senior Assistant. During all these years he accepted the promotion without any demure or protest. On 20th November, 1993 a legal notice was sent by Respondent No.1 to the Petitioner claiming that he ought

to have been promoted as an Assistant from 1971 instead of 23rd June, 1973 as four other employees appointed in the year 1963 along with him have been promoted as Assistant in 1971. The Petitioner/ management replied that the case of the Respondent No.1 was considered in 1971, however due to an adverse entry for the year 1969 he was not found fit for promotion. Since there were no adverse entries for the year 1970, 1971 & 1972 he was promoted in the year 1973. On a dispute being raised the following terms of reference were sent for adjudication on 14th November, 1995 "whether Shri Om Prakash is entitled to be promoted as Assistant and Senior Assistant from the dates his juniors had been promoted, if so, to what relief, including the consequential benefits is he entitled to and what directions are necessary in this respect?". The following issues were framed by the learned Adjudicator i.e. (i) as per the terms of reference and (ii) whether the claims is not maintainable for the reasons stated in para 1 & 2 of the preliminary objections of the management.

3. The preliminary objections raised by the management were that promotion to the post of Assistant was based on seniority-cum-merit and since Respondent No.1 was not found fit for promotion in 1971 he was not promoted to the said post. The other objection was that the Respondent No.1 was considered for promotion at the proper time and the case was considered in very next meeting when the workman was due for promotion and the ACRs of the year 1970, 1971 and 1972 were considered and since workman was awarded 'satisfactory' grading, he was promoted in the year 1973. Since in 1969 due to 'poor' grading, the workman was not found up to the merit, as such he was not entitled to be promoted in 1971. On considering

the evidence of the parties and the fact that the Respondent No.1 was not communicated the adverse ACR for the year 1969, the learned Tribunal came to the conclusion that in view of the non-communication of the adverse ACR to the workman as per law the ACR for the year 1969 has to be treated as non-existent, the same cannot be acted upon, and thus directed the management to consider the case of Respondent No.1 for promotion as Assistant and Senior Assistant from the dates his juniors have been promoted.

4. Learned counsel for the Petitioner has raised only one objection. It is contended that Respondent No.1 was promoted as Assistant in 1973 and he continued therein and also earned further promotions, however he did not agitate his grievance till 20th November, 1993. Thus, in view of the delay of more than 20 years in raising the dispute, the Respondent No.1 could not have raised the dispute as a stale dispute is non-existent divesting the Tribunal of the jurisdiction to entertain the same. Reliance in this regard is placed on *The Nedungadi Bank Ltd. Vs. K.P. Madhavankutty and Ors. AIR 2000 SC 839,* and thus the award is liable to be set aside on this short point itself.

5. Learned counsel for the Respondent on the other hand contends that the writ petition is liable to be dismissed on the grounds of delay and latches as it was filed after one and a half years of the passing of the award. Further, no plea of delay was taken before the Industrial Tribunal nor was the same adjudicated upon. Since this issue was neither framed and no evidence was led on this count, the Petitioner is now barred from raising this plea before this Court in the writ petition. Further the Industrial Disputes Act (in short

the ID Act) prescribes no limitation. The only stand of the Petitioner before the learned Tribunal was that the Respondent No.1 was not found fit for promotion in the year 1971 in view of adverse ACRs of the year 1969 which admittedly was not communicated to him and thus the learned Tribunal was justified in directing that the case of the Respondent No.1 be considered for promotion to the post of Assistant and Senior Assistant from the date when other workmen from his batch were considered.

6. I have heard learned counsel for the parties. The short issue involved in the present petition is whether the issue of a stale claim and a gross delay in filing the claim before the Industrial Adjudicator can be considered in a writ petition challenging the award in the first instance, when no such plea has been taken before the learned Adjudicator. In the present case admittedly the Petitioner was promoted to the post of Assistant on 23rd June, 1973 and his grievance was that he was not promoted in the year 1971 when others who were appointed along with him were promoted. For the first time Respondent No.1 raised this grievance on 20th November, 1993 when he sent a legal notice. Thus, the claim of Respondent No.1 was highly belated even beyond a period of more than 20 years. In *Nedungadi Bank Ltd.* (supra) their Lordships held:

> "5. Now the Central Government made the reference which has been reproduced above. This time the Bank felt aggrieved and challenged the reference by filing writ petition, which by order dated January 24, 1995 was allowed by the learned single Judge and on appeal filed by the respondent (sic) Division Bench validity of the reference was upheld.
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> 6. Law does not prescribe any time limit for the appropriate Government to exercise its powers under Section 10 of the Act.

It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after lapse of about seven years of order dismissing the respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under Section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising industrial dispute was ex facie bad and Incompetent.

7. In the present appeal, it is not the case of the respondent that the disciplinary proceedings, which resulted in his dismissal, were in any way illegal or there was even any irregularity. He availed his remedy of appeal under the rules governing his conditions of service. It could not be said that in the circumstances industrial dispute did arise or was even apprehended after lapse of about seven years of the dismissal of the respondent. Whenever a workman raises some dispute it does not become industrial dispute and appropriate Government cannot in a mechanical fashion make the reference of the alleged dispute terming as industrial dispute. Central Government lacked power to make reference both on the ground of delay in invoking the power under Section 10 of the Act and there being no industrial dispute existing or even apprehended. The purpose of reference is to keep industrial peace in an establishment. The present reference is destructive

to the industrial peace and defects the very object and purposes of the Act. Bank was justified in thus moving the High Court seeking an order to quash the reference in question.

8. It was submitted by the respondent that once a reference has been made under Section 10 of the Act a labour Court has to decide the same and High Court in writ jurisdiction cannot interfere in the proceedings of the Labour Court. That is not a correct proposition to state. An administrative order which does not take into consideration statutory requirements or travels outside that it is certainly subject to judicial review limited though it might be. High Court can exercise its powers under Article 226 of the Constitution to consider the question of very jurisdiction of the Labour Court. In National Engineering Industries Ltd. v. State of Rajasthan : (2000)ILLJ247SC this Court observed:

> It will be thus seen that High Court has jurisdiction to entertain a writ petition when there is allegation that there is no industrial dispute and none apprehended which could be subject matter of reference for adjudication to the Industrial Tribunal under Section 10 of the Act. Here it is a question of Jurisdiction of the industrial dispute, which could be examined by the High Court in Its writ jurisdiction. It is the existence of the industrial tribunal which would clothe the appropriate Government with power to make the reference and the industrial Tribunal to adjudicate it. If there is no industrial dispute in existence or apprehended appropriate Government lacks power to make any reference.

9. We, therefore, allow the appeal, set aside the impugned judgment of the Division Bench and restore that of the learned single Judge. However, there shall be no order as to costs.

7. However, this plea of delay and latches was never taken by the Petitioner before the Industrial Tribunal. In *Ajaib Singh Vs. Sirhind*

Cooperative Marketing-cum-Processing Service Society Limited and Anr. (1999) 6 SCC 82 their Lordships held:

> "10. It follows, therefore, that the provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the tribunal, labour court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/termination or dismissal. The court may also in appropriate cases direct the payment of part of the back wages instead of full back wages. Reliance of the learned counsel for the respondent management on the Full Bench judgment of the Punjab and Haryana High Court in *Ram Chander Morya* v. *State of Haryana* [(1999) 1 SCT 141 (P&H) : ILR (1999) 1 P& H 93 (FB)] is also of no help to him. In that case the High Court nowhere held that the provisions of Article 137 of the Limitation Act were applicable in the proceedings under the Act. The Court specifically held "neither any limitation has been provided nor any guidelines to determine as to what shall be the period of limitation in such cases". However, it went on further to say that
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> > "reasonable time in the cases of labour for demand of reference or dispute by appropriate Government to labour tribunals will be five years after which the Government can refuse to make a reference on the ground of delay and laches if there is no explanation to the delay".
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> We are of the opinion that the Punjab and Haryana High Court was not justified in prescribing the limitation for getting the reference made or an application under Section 33-C of the Act

to be adjudicated. It is not the function of the court to prescribe the limitation where the legislature in its wisdom had thought it fit not to prescribe any period. The courts admittedly interpret law and do not make laws. Personal views of the Judges presiding over the Court cannot be stretched to authorise them to interpret law in such a manner which would amount to legislation intentionally left over by the legislature. The judgment of the Full Bench of the Punjab and Haryana High Court has completely ignored the object of the Act and various pronouncements of this Court as noted hereinabove and thus is not a good law on the point of the applicability of the period of limitation for the purposes of invoking the jurisdiction of the courts/boards and tribunal under the Act.

11. In the instant case, the respondent management is not shown to have taken any plea regarding delay as is evident from the issues framed by the Labour Court. The only plea raised in defence was that the Labour Court had no jurisdiction to adjudicate the reference and the termination of the services of the workman was justified. Had this plea been raised, the workman would have been in a position to show the circumstances preventing him in approaching the Court at an earlier stage or even to satisfy the Court that such a plea was not sustainable after the reference was made by the Government. The learned Judges of the High Court, therefore, were not justified in holding that the workman had not given any explanation as to why the demand notice had been issued after a long period. The findings of facts returned by the High Court in writ proceedings, even without pleadings were, therefore, unjustified. The High Court was also not justified in holding that the courts were bound to render an even-handed justice by keeping balance between the two different parties. Such an approach totally ignores the aims and object and the social object sought to be achieved by the Act. Even after noticing that "it is true that a fight between the workman and the management is not a just fight between equals", the Court was not justified to make them equals while returning the findings, which if allowed to prevail, would result in frustration

> of the purpose of the enactment. The workman appears to be justified in complaining that in the absence of any plea on behalf of the management and any evidence, regarding delay, he could not be deprived of the benefits under the Act merely on the technicalities of law. The High Court appears to have substituted its opinion for the opinion of the Labour Court which was not permissible in proceedings under Articles 226/227 of the Constitution.
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> 12. We are, however, of the opinion that on account of the admitted delay, the Labour Court ought to have appropriately moulded the relief by denying the appellant workman some part of the back wages. In the circumstances, the appeal is allowed, the impugned judgment is set aside by upholding the award of the Labour Court with the modification that upon his reinstatement the appellant would be entitled to continuity of service, but back wages to the extent of 60 per cent with effect from 8-12-1981 when he raised the demand for justice till the date of award of the Labour Court, i.e., 16-4-1986 and full back wages thereafter till his reinstatement would be payable to him. The appellant is also held entitled to the costs of litigation assessed at Rs 5000 to be paid by the respondent management.

8. In *Nedungadi Bank Ltd. (supra)* their Lordships were dealing with a claim at the stage of reference itself. It was thus held that no dispute existed as the workman belatedly came up with the plea that since two other employees dismissed from service were reinstated, he was also entitled to reinstatement and sought a reference. It was observed that in the absence of facts showing in what circumstances the other two employees were dismissed and subsequently reinstated, the demand raised was ex facie bad and incompetent. In the present case admittedly this plea of delay was not taken by the Petitioner before the Tribunal and thus Respondent No.1 had no opportunity to prove the reasons for his belated action. Thus, this Court will

not permit the Petitioner to raise this plea at this stage in view of the law laid down in *Ajaib Singh(supra)*.

9. Petition is dismissed accordingly.

(MUKTA GUPTA)
JUDGE

JULY 26, 2012
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