




Case No. WP (C) No. 14/10

Serial No.	Date	Order (s) with Signature (s)
1	2	3
05.	01.09.10	<p style="text-align: center;"><u>BEFORE</u></p> <p style="text-align: center;">HON'BLE THE CHIEF JUSTICE MR. JUSTICE P.D. DINAKARAN</p> <p>Present: Mr. A. Moulik, Sr. Advocate with Mr. Mr. N.G. Sherpa, Ms. K.D. Bhutia, Mr. Manish Kr. Jain and Mr. Leonard Gurung, Advocates for the petitioner.</p> <p>Mr. J. B. Pradhan, Addl. Advocate General with Mr. Karma Thinlay Namgyal, Govt. Advocate and Mr. S. K. Chettri, Asstt. Govt. Advocate for the State-respondents No. 1 to 5.</p> <p style="text-align: center;">The writ petition stands disposed of, vide detailed judgment delivered in separate sheets.</p> <p style="text-align: center;"> Chief Justice 01.09.10</p>

rsr/jk



IN THE HIGH COURT OF SIKKIM AT GANGTOK
(Civil Extra Ordinary Jurisdiction)

DATED : 01.09.2010

CORAM

HON'BLE MR. JUSTICE P.D. DINAKARAN, CHIEF JUSTICE

Writ Petition (C) No. 14 of 2010

Shri Syriac Joseph,
Computer Programmer,
Water Security & PHE Department,
Government of Sikkim,
Gangtok.

...Petitioner.

-versus-

1. The Department of information Technology,
Represented by and through the
Commissioner-cum-Secretary,
Government of Sikkim, Gangtok,
P.O. Gangtok, East Sikkim.
2. The Finance Department,
Represented by and through the
Principal Secretary (Finance),
Government of Sikkim,
Tashiling Secretariat,
P.O. Tashiling Secretariat,
Gangtok, East Sikkim.
3. Department of Personnel,
Represented by and through the Secretary,
Government of Sikkim
Tashiling Secretariat,
P.O. Tashiling Secretariat,
Gangtok, East Sikkim.



4. Sikkim Public Service Commission,
Represented by and through its Chairman,
Government of Sikkim, Gangtok,
P.O. Gangtok, East Sikkim.
5. Water Security & PHE Department,
Represented by and through the Secretary,
Government of Sikkim, Gangtok,
P.O. Gangtok, East Sikkim.
6. Shri Sonam Tashi Wangdi,
Deputy Director (officiating),
Power Department,
Government of Sikkim, Gangtok,
P.O. Gangtok, East Sikkim.
7. Shri Prem Vijay Basnet,
Deputy Director (officiating),
Information Technology Department,
Government of Sikkim, Gangtok,
P.O. Gangtok, East Sikkim.
8. Shri Chewang Namgyal Bhutia,
Deputy Director (officiating),
Human Resources Development Department,
Government of Sikkim,
Tashiling Secretariat,
P.O. Tashiling Secretariat,,
Gangtok, East Sikkim.
9. Shri Phigu Tshering Bhutia,
Deputy Director (officiating),
Vigilance Department,
Government of Sikkim, Gangtok,
P.O. Gangtok, East Sikkim.
10. Shri Dhan Kumar Chettri,
Assistant Director,
Election Department,
Government of Sikkim,
P.O. Gangtok, East Sikkim.
11. Shri Deepankar Lama,
Assistant Director,
Urban Development & Housing Department,



Government of Sikkim,
P.O. Gangtok, East Sikkim.

12. Shri Sonam L. Kaleon,
Assistant Director,
Rural Management Development Department,
Government of Sikkim,
P.O. Gangtok, East Sikkim.
13. Shri Ashim Tamang,
Assistant Director (officiating),
Information Technology Department,
Government of Sikkim,
P.O. Gangtok, East Sikkim.
14. Shri Bikash Diyali,
Assistant Director (Officiating),
Finance, Income Tax/
Commercial Tax Department,
(IT/CT Department),
Government of Sikkim,
P.O. Gangtok, East Sikkim.
15. Smt. Palden Ongchu Pazo,
Assistant Director (officiating),
Social Justice, Empowerment &
Welfare Department,
(S.J.E. & Welfare Department)
Government of Sikkim,
P.O. Gangtok, East Sikkim.
16. Smt. Tenzeen T. Bhutia,
Assistant Director (officiating),
Tourism Department,
Government of Sikkim,
P.O. Gangtok, East Sikkim.
17. Smt. Tashi Ongmu Bhutia,
Assistant Director (Officiating),
Agriculture Department,
Government of Sikkim,
P.O. Gangtok, East Sikkim.
18. Smt. Abhina Thapa,
Assistant Director (Officiating),



Tourism Department,
Sikkim House, New Delhi,
Panchasheel Marg,
P.O. Chanakyapuri,
New Delhi, India.

19. Shri Karma Zimba Bhutia,
Assistant Director (Officiating),
SNT Division, Transport Department,
Government of Sikkim,
P.O. Gangtok, East Sikkim.

...Respondents.

- | | |
|---------------------|---|
| For the petitioner | : Mr. A. Moulik, Sr. Advocate with Mr. N. G. Sherpa, Ms. K. D. Bhutia, Mr. Manish Kr. Jain and Mr. Leonard Gurung, Advocates |
| For the respondents | : Mr. J.B. Pradhan, Additional Advocate General with Mr. Karma Thinlay Namgyal, Govt. Advocate, Mr. S.K. Chettri, Asst. Govt. Advocate and Mr. J. K. Kharka, Advocate (Standing Counsel for SPSC) for official respondents. |

JUDGEMENT

DINAKARAN, CJ

1. The petitioner is challenging the promotion of the contesting respondents no. 6 to 19 from the post of Computer Programmer to the post of Assistant Director and the further promotion of respondents no. 6, 7 and 8 to the post of Deputy Director, as per the following table:



TABLE

Sl No	Names	Respondent Nos.	Date of appointment in the equivalent rank of programmer/ Asstt. Programmer etc. in the scale of Rs.5500-9000	Assistant Director Rs.7000-11500		Date of upgradation In Deputy Director rank Rs. 9000-13800 (officiating)
				Dates of officiating promotion	Dates of Regularisation	
1	Syriac Joseph (Petitioner)	...	12.07.96
2	Phigu Tshering Bhutia	9	6.3.2000	...	20.07.04	Date unknown
3	Sonam Tashi Wangdi	6	24.05.02	23.06.03	20.02.04	02.03.09
4	Prem Vijay Basnet	7	24.05.02	23.06.03	20.02.04	02.03.09
5	Chewang N. Bhutia	8	24.05.02	23.06.03	20.02.04	02.03.09
6	D.K. Chettri	10	13.08.03	Promotion by relaxation	31.10.05	
7	Deepankar Lama	11	13.08.03		31.10.05	
8	Sonam L. Kaleon	12	13.08.03		31.10.05	
9	Ashim Tamang	13	13.08.03	26.10.06		
10	Bikash Diyali	14	13.08.03	29.03.08		
11	Paldon Ongchu Pazo	15	13.08.03	29.03.08		
12	Teneen Bhutia	16	13.08.03	29.03.08		
13	Tashi O. Bhutia	17	13.08.03	29.03.08		
14	Abina Thapa	18	13.08.03	29.03.08		
15	Karma Zimba Bhutia	19	2004	20.06.08		

2. The main grievance of the petitioner is that he is the seniormost Computer Programmer as compared to that of respondents no. 6 to 19 and that he also possesses the requisite qualification to be promoted as Assistant Director, as per the Notification No. 12/GEN/DOP dated 17.04.2001 of the Government of Sikkim, published in the Official Gazette dated 01.05.2001, relevant portion of which reads as hereunder: -



GOVERNMENT OF SIKKIM
DEPARTMENT OF PERSONNEL, ADM.
REFORMS & TRAINING
GANGTOK

No. 12/GEN/DOP

Dated: 17.4.2001

In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor hereby makes the following rules regulating the method of recruitment to the posts of Assistant Director, Deputy Director, Joint Director, Additional Director and Director in the Information Technology Department, namely:

1. Short title and commencement:

- (1) These rules may be called the Sikkim State Information Technology Service Recruitment Rules, 2001;
- (2) They shall come into force at once.

2. Number of posts, classification and scale of pay:

The number of posts, their classification and scales of pay attached thereto in relation to the posts of Assistant Director, Deputy Director, Joint Director, Additional Director and Director shall be as specified in column 2, 3 and 4 of the Schedule.

3. Method of recruitment, age limit, qualification, etc.:

The method of recruitment, age limit, qualification and other matters relating to the said posts of Assistant Director, Deputy Director, Joint Director, Additional Director and Director shall be as specified in column 5 of the Schedule.

4. Power to relax – Where the State Government is of the opinion that it is necessary or expedient so to do, it may, by an order, for reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category of persons.



Provided that where no suitable sufficient provisions have been made in so far as the Sikkim State Information Technology Service Recruitment Rules are concerned, the provisions as applicable to the staff/officers of the corresponding grade shall, mutatis mutandis apply subject to such modification as may be made or required to be made.

5. Saving: Nothing in these rules shall affect reservation, relaxation of age limit and other concession required to be provided to the Scheduled Castes, Scheduled Tribes, Other Backward Classes and other special categories of persons in accordance with the orders issued by the State Government from time to time in this regard.

6. Unless otherwise specified by a separate order the expenditure on salaries of the incumbents appointed under the Sikkim State Information Technology Service Recruitment Rules 2001 shall be met from the Budget Head 2852-07-800-OE-40-IT-400001-Salaries under PLAN.

R.S. BASNET,
Secretary to the Government of Sikkim,
Department of Personnel, Adm.
Reforms and Training.

SCHEDULE

Sl No	Name of post	Number of posts	Classification /Grade	Scale of pay	Method of recruitment	Eligibility conditions required for direct recruitment /promotees
1.	Assistant Director	5	Junior Grade	Rs. 7000-225-11500	1 post by deputation or Transfer and 4 posts by direct recruitment after 2002 AD	Age between 21 years and 30 years. Upper age limit relaxable by five years in the case of Scheduled Tribe/ Schedule Caste candidates



and by three years in the case of Other backward Classes category of candidates. Educational Qualification - Graduates with PG Diploma in Computer application from a recognised university with 1 years experience in Information Technology OR electronics Graduates or Computer Science Graduates with 1 years experience in Information Technology Or Master in Computer Application.

2.	XXX	XXX	XXX
3.	XXX	XXX	XXX
4.	XXX	XXX	XXX
5.	XXX	XXX	XXX

..

3.1 Mr. A. Moulik, learned senior counsel appearing for the petitioner contends that the promotion of the contesting respondents no. 6 to 19 are discriminatory, arbitrary and unreasonable.

3.2 Mr. Moulik, further contends that respondents no. 10, 11 and 12 were promoted from the post of Computer Programmer to the post of Assistant Director by promotion, which post, as per the provision of Sikkim State Information



Technology Service Recruitment Rules, 2001, ought to be filled up only by direct recruitment. Hence, the writ petition.

4.1 Mr. J.B. Pradhan, learned Additional Advocate General appearing on behalf of the State-respondents clarify that as per the Notification No. 12/GEN/DOP dated 17.04.2001, referred to above, all the posts of Assistant Director are to be filled up by direct recruitment, except one post which is to be filled up by deputation or transfer.

4.2 Learned Additional Advocate General further clarifies that even though it stated that the respondents no. 6 to 19 were promoted to the post of Assistant Director, they were not promoted but considered for direct recruitment as internal candidates, at different point of time, which varies from 2003 to 2008 because the relevant Rules notified on 17.04.2001, referred to supra, provides for recruitment of Assistant Directors only by way of direct recruitment/by deputation or transfer, but not by promotion as contended by the petitioners.

4.3 Mr. J.B. Pradhan, learned Additional Advocate General contends that the petitioner is not entitled to challenge the promotion of contesting respondents no. 6 to 19 to the posts of Assistant Director which was made in the years 2003 to 2008, as



the respondents were considered not as promotees, but as direct recruits, considering them as internal candidates.

4.4 Mr. J.B. Pradhan, learned Additional Advocate General further contends that since the respondents no. 6, 7 and 8 were subsequently promoted to the post of Deputy Directors with effect from 02.03.2009, the petitioner, who never challenged the promotion of the respondents No. 6, 7 and 8 to the post of Assistant Director with effect from 23.06.2003, is not entitled to challenge the promotion of respondents No. 6, 7 and 8 to the post of Deputy Director at this point of time. According to learned Additional Advocate General, when the petitioner himself failed to approach the Court in time to challenge the recruitment of respondents no. 6 to 19 to the posts of Assistant Director and also failed to challenge the subsequent promotion of respondents No. 6, 7 and 8 to the posts of Deputy Director immediately thereafter, he is not entitled to challenge the said promotions now, as per the decision of the apex Court in

- (i) ***P.S. Sadasivaswamy vs. State of Tamil Nadu*** reported in **(1975) 1 SCC 152**; and
- (ii) ***Shiv Dass vs. Union of India and others*** reported in **(2007) 9 SCC 274**.



4.5 Learned Additional Advocate General also brought to my notice that the Government of Sikkim had framed the Sikkim State Subordinate Information Technology Service Recruitment Rules, 2005, notified by a Notification No. 143/GEN/DOP dated 06.05.2005, and the service of the petitioner as a Computer Programmer is governed by the same. Clause 5 of the said Rules reads as hereunder:

"5. Persons holding duty posts:-

All persons holding duty posts on the appointed day shall be deemed to have been appointed to the corresponding duty posts respectively held by them."

4.6 As per the Subordinate Service Rules dated 06.05.2005, referred to above, the learned Additional Advocate General submits that the petitioner is in Seniority No. 2.

4.7 In any event Mr. Pradhan, the learned Additional Advocate General fairly submits that the case of the petitioner will be considered not for promotion but for direct recruitment to the post of Assistant Director, treating him as an internal candidate, as in the case of respondents no. 6 to 19, as per the Sikkim State Information Technology Service Recruitment Rules, 2001, as referred to above, within a period of three weeks from the date of receipt of this order.



5. Mr. A. Moulik, learned senior counsel appearing for the petitioner, of course, has fairly conceded that the petitioner will be satisfied, if he is considered as an internal candidate to the post of Assistant Director as in the case of contesting respondents no. 6 to 19.

6. I have given careful consideration to the submissions made by the learned counsels for the parties.

7.1 It is the settled law that the petitioner has not chosen to challenge the recruitment of respondents no. 6 to 19 as internal candidates for the posts Assistant Director, which was made in the years 2003 to 2008 and the subsequent promotion of respondents No. 6, 7 and 8 to the posts of Deputy Director on 02.03.2009.

7.2 The petitioner had not chosen to challenge the recruitment of respondents no. 6 to 19 as Assistant Directors made in the years 2003 to 2008 and the subsequent promotion of respondents No. 6, 7, and 8 to the posts of Deputy Director with effect from 02.03.2009, and therefore, he is not entitled to challenge the same after lapse of more than seven years.



7.3 The above view is also supported by the law laid down by the apex Court in ***Karnataka Power Corpn. Ltd through its Chairman & Managing Director and another vs, K. Thangappan and another*** reported in (2006) 4 SCC 322, wherein it held as follows: -

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

7. What was stated in this regard by Sir Barnes Peacock in *Lindsay Petroleum Co. v. Prosper Armstrong Hurd* (PC at p.239) was approved by this Court in *Moon Mills Ltd. V. M.R. Meher and Maharashtra SRTC v. Shri Balwant Regular Motor Service*. Sir Barnes had stated:

"Now, the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be



reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitation, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy."

8. It would be appropriate to note certain decisions of this Court in which this aspect has been dealt with in relation to Article 32 of the Constitution. It is apparent that what has been stated as regards that article would apply, a fortiori, to Article 226. It was observed in *Rabindranath Bose v. Union of India* that no relief can be given to the petitioner who without any reasonable explanation approaches this Court under Article 32 after inordinate delay. It was stated that though Article 32 is itself a guaranteed right, it does not follow from this that it was the intention of the Constitution-makers that this Court should disregard all principles and grant relief in petitions filed after inordinate delay.

9. It was stated in *State of M.P. v. Nandlal Jaiswal* that the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in exercise of its writ jurisdiction. It was stated that this rule is premised on a number of factors. The



High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring, in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party rights in the meantime is an important fact which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.

10. It has been pointed out by this Court in a number of cases that representations would not be adequate explanation to take care of delay. This was first stated in *K.V. Rajalakshmiiah Setty v. State of Mysore*. This was reiterated in *Rabindranath Bose case* by stating that there is a limit to the time which can be considered reasonable for making representations and if the Government had turned down one representation the making of another representation on similar lines will not explain the delay. In *State of Orissa v. Pyarimohan Samantaray* making of repeated representations was not regarded as satisfactory explanation of the delay. In that case the petition had been dismissed for delay alone. (See *State of Orissa v. Arun Kumar Patnaik* also)."

8. As rightly pointed out by the learned Additional Advocate General, even though, the respondents nos. 6 to 19 were appointed as Assistant Director considering them as internal candidates and recruited only by way of direct recruitment, the Rule provides only for direct recruitment/deputation or transfer. Therefore, the allegation of the petitioner that respondents no. 6



to 19 were promoted from the post of Computer Programmer to the post of Assistant Director is not correct, as there cannot be any promotion which is not provided in the relevant Rules.

9. However, I appreciate the stand taken by the learned Additional Advocate General that the respondents No. 1 and 3 would consider the petitioner as an internal candidate for direct recruitment to the post of Assistant Director at the earliest point of time, in any event within three weeks from the date of receipt of this Order.

Hence, suffice it to record the statement of the learned Additional Advocate General that the respondents No. 1 and 3 are prepared to consider the case of the petitioner, who is also fully qualified for appointment to the post of Assistant Director, as an internal candidate, as in the case of respondents No. 6 to 19 for the post of Assistant Director within a period of 3 weeks from the date of receipt of this order.

The writ petition thus stands disposed of accordingly.

(P.D. DINAKARAN, CJ)

Index : Yes/No
Internet : Yes/No

rsr/jks