

**BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
AT DEHRADUN**

Present: Hon'ble Mr. Justice U.C.Dhyani

----- Chairman

Hon'ble Mr. Rajeev Gupta

-----Vice Chairman (A)

CLAIM PETITION NO. 124/DB/2021

1. Bhuwan Chandra Joshi, Section Officer, Home-6, Uttarakhand Government.
2. Vijay Kumar Mangain, Section Officer, *Karmik-1*, Uttarakhand.
3. Sandeep Kumar Sharma, Section Officer, *Karmik-2*, Uttarakhand Government.
4. Arvind Kumar Chandola, Section Officer, Basic Education,-2, Uttarakhand Government.
5. Ranbeer Singh, Section Officer, Agriculture-4, Uttarakhand Government.

.....Petitioners

vs.

1. State of Uttarakhand through Chief Secretary, Uttarakhand Govt. Secretariat, Subhash Road, Dehradun.
2. Principal Secretary, Secretariat Administration Department (S.A.D.) Uttarakhand, Govt. Secretariat.
3. Secretary, Uttarakhand Govt. Secretariat, Subhash Road, Dehradun.
4. Sh. Ramesh Singh Rawat, presently posted as Section Officer (*Niyamawali Prakoshth Anubhag*), Uttarakhand Secretariat, Dehradun.
5. Sh. Hardyal Budakoti, presently posted as Section Officer (*Karyakram Kriyanvyan Anubhag*), Uttarakhand Secretariat, Dehradun.
6. Sh.Chiranjilal Raturi, presently posted as Section Officer (*Rajaswa Anubhag-3*), Uttarakhand Secretariat, Dehradun.
7. Smt. Jyotibala, presently posted as Section Officer (*Bhasha Anubhag*) Section-1, Uttarakhand Secretariat, Dehradun.
8. Smt. Kamlesh Joshi, presently posted as Section Officer (*Vitta Anubhag-8*) Education Section 4, Education Department, Uttarakhand Secretariat, Dehradun.

.....Respondents.

Present: Sri B.B.Naithani, Advocate, for the Petitioners

Sri V.P.Devrani, A.P.O., for the State Respondents

JUDGMENT

DATED: DECEMBER 07, 2021

Justice U.C.Dhyani (Oral)

By means of the present claim petition, the petitioners seek the following reliefs:

“1(a) Hon’ble Tribunal may be graciously pleased to issue order or direction to the 1st respondent to conduct an high level enquiry into fraudulent action and manner in which the private respondents have been extended the undue benefits of absorption and other benefits in the Uttarakhand Secretariat.

(b) Hon’ble Tribunal may further be pleased to quash the following:

(i) Order No. XXXI(2)/2021-08(17) Vividh/2017 dated 11.08.2021 (Annexure No. A-1) (by which representation dated 14.05.2020 has been rejected arbitrarily).

(ii) Order No. 168/XXXI(2)/2005 dated 11.09.2006 (Annexure No. A-7) (by which respondent no. 4 has been illegally absorbed on the post of Assistant Review Officer).

(iii) Order No. 176/XXXI(1)/05-55(1)2005 dated 10.02.2005 (Annexure No. A-8) (by which respondent no. 5 has been illegally absorbed on the post of Typist).

(iv) Order No. 120/XXXI(2)/2008 dated 11.09.2006 (Annexure No. A-9) (by which respondent no. 5 has further been illegally absorbed on the post of Assistant Review Officer).

(v) Order No.2050 /XXXI(2)/2008 dated 26.11.2008 (Annexure No. A-16) (by which respondent no. 6 was illegally substantively absorbed on the post of Assistant Review Officer).

(vi) Order No.1414/XXXI(2)/11-Savi.-5/2009 dated 04.10.2011 (by which respondent No. 6 was absorbed retrospectively and provisionally (Aabhasi Taur Par) on the post of Assistant Review Officer since 25.06.2002 illegally and fraudulently).

(vii) Order No. 860/XXXI(2)/10-Savi.-5/2009 dated 25.05.2010 (Annexure No. A-20) (by which the respondent no. 7 has been illegally absorbed retrospectively w.e.f. 15.12.2004).

(viii) Order No. 1714/XXXI(2)/2008 dated 20.10.2008 (Annexure No. A-23) (by which the respondent no.7 have further been promoted substantively but illegally on the post of Assistant Review Officer).

(ix) Order No. 1455/Ek-4/2002 dated 15.07.2002 (Annexure No. 26) (by which respondent No. 8 has been illegally shown as transferred to Secretariat w.e.f. 23.02.2005 on the post of Senior Clerk).

(x) Order No. 2035/Ek-4/2002 dated 24.07.2002 (Annexure No. A27) by which respondent no. 8 has further been illegally promoted/appointed substantively on the post of Avar Varg Sahayak (Assistant Review Officer).

(c) *Hon'ble Tribunal may further be pleased to direct the respondents no. 2 & 3 to take away the undue benefits received by the private respondents on the strength of their illegal absorption made by respondents no. 2 & 3.*

(d) *Hon'ble Tribunal may further be pleased to direct or order to respondents no. 2 & 3 to review the whole disputed matter keeping in view the statements made by the petitioner vide this petition and to stream line the consequential benefits for which the petitioners are legally eligible.*

(e) *This Hon'ble Tribunal may further be pleased to issue an order or direction which that Hon'ble Tribunal may deem fit and proper under circumstances of the case under consideration.*

(f) *This Hon'ble Tribunal may kindly be further pleased to award cost to the petitioners."*

2. At the outset, learned A.P.O. vehemently opposed the maintainability of the present claim petition, *inter-alia*, on the ground that the same is highly belated and barred by limitation. The petitioners have challenged the orders dated 10.02.2005, 11.09.2006, 26.11.2008, 04.10.2011, 25.05.2010, 20.10.2008, 15.07.2002, 24.07.2002 among others, including Office Memorandum dated 11.08.2021 whereby non-statutory representation of some of the Section Officers was rejected by the Additional Chief Secretary, Secretariat Administration Department, Govt. of Uttarakhand. The petitioners are aggrieved by the merger of private respondents in the Secretariat. *Uttaranchal Sachivalay Vaiyaktik Sahayak, Apar Varg Sahayak, Sahayak Lekhakar, Tankak, Anusewak Ke Padon Par Sanvailiyan Niyamawali, 2002* has been brought on record with the claim petition.

3. A writ petition being WPSS No.1776/2014, Padam Kumar Verma and others vs. State of Uttarakhand and others was filed before Hon'ble High Court of Uttarakhand, who, *vide* order dated 31.10.2014 was pleased to pass following order:

".....in view thereof, the writ petition is dismissed on the ground of alternative remedy. However, it is made clear that the dismissal of the writ petition will not prejudice the case of the petitioners before the State Public Services Tribunal in the event it goes before it."

4. It has been indicated, as a passing reference, in the Office Memorandum dated 11.08.2021 of Secretariat Administration Department (SAD) (Annexure No. A1) that no claim petition was filed before the Public Services Tribunal. The SAD, therefore, rejected the non-statutory representation of the applicants, *inter-alia*, on the ground that there is no scope for reopening merger/seniority issues, which relate to the Merger Rules, 2002. For availing the remedy before this tribunal, the petitioners should have, atleast, filed the claim petition within 1 year of receiving certified copy of the judgment dated 31.10.2014, passed by the Hon'ble High Court. The petitioners did not do so.

5. Learned Counsel for the petitioners drew attention of the Tribunal towards Office Memorandum dated 08.05.2002 (Annexure No. A5) issued by the SAD, to argue that some of the employees including respondent No. 4, were directed to be repatriated to their parent department. It is the submission of learned Counsel for the petitioner that the Respondent no. 4 is still continuing in SAD and, therefore, the petitioners have continuous cause of action in filing the claim petition.

6. In all humility, this Tribunal does not subscribe to the view of the arguments of learned Counsel for the petitioners that there is continuous cause of action in favour of the petitioners. If nothing was done in compliance of the Office Memorandum dated 08.05.2002 (Annexure No. A5), the aggrieved persons should have filed the claim petition before this Tribunal on or before 08.05.2003. They cannot come in the year 2021, to seek any relief in respect of an O.M., which was issued on 08.05.2002. Further, some of the petitioners approached Hon'ble High Court and, as, has been mentioned above, the Hon'ble High Court directed them to approach Public Services Tribunal *vide* order dated 31.10.2014. The petitioners did not do so. They could have, at the most, availed remedy on or before 31.10.2015, but they failed to do so. The claim petition, therefore, appears to be barred by limitation. If the claim petition is scrutinized from the point of view of relief (b), the claim petition appears to be barred by delay and laches.

7. Learned Counsel for the petitioners drew attention of this Tribunal towards the observations made by Hon'ble Apex Court in Civil Appeal No. 5097-5099 of 2004, A.V. Papayya Sastry & others vs. Government of A.P. & others, decided on 07.03.2007, as below:

“No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud.”

.....

Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants.”

8. The Tribunal is unable to comprehend as to how the fraud was committed by accepting merger of private respondents. Annexure No. A5 also does not indicate 'fraud' on the part of private respondents. Learned Counsel for the petitioners also drew attention of this Tribunal towards some of the observations made by Hon'ble Apex Court in Maya Rani Punj vs. Commissioner of Income Tax, Delhi, 1986 SCC (1) 444, as below:

“7. If a duty continues from day to day, the non-performance of that duty from day to day is a continuing wrong. The legislative scheme under section 271(1)(a) of the 1961 Act in making provision for a penalty conterminous with the default to be raised provides for a situation of continuing wrong.”

A Bench of this Court in State of Bihar v. Deokaran Nenshi, [1973] 1 S.C.R. 1004, while examining the provisions of section 66 of the Mines Act, very appropriately drew the distinction between continuing offence and offences which take place when an act or omission is committed once and for all. Shelat, J. speaking for the Court stated :

"A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

In Suresh Seth's case quoted Lord Lindley in *Hole v. Chard Union*, [1894]1 Ch. D. 293, where the following observation had been made:

"What is a continuing cause of action? Speaking accurately, there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought."

.....

In 'Words & Phrases', Permanent Edition, under the head 'Continuing Offence', instances have been given which indicate that as long as the default continues the offence is deemed to repeat and, therefore, it is taken as a continuing offence. As has been appropriately indicated in *Corpus Juris Secundum*, Vol. 85, p. 1027, accrual of penalty depends upon the terms of the statute imposing it and in view of the language used in section 271(1)(a) of the 1961 Act, the position is beyond dispute that the Legislature intended to deem the non-filing of the return to be a continuing default - the wrong for which penalty is to be visited, commences from the date of default and continues month after month until compliance is made and the default comes to an end. The rule of *de die in diem* is applicable not on daily but on monthly basis.

In *State v. A.H. Bhiwandiwalla*, A.I.R. 1955 Bombay 161, (a decision referred to in Suresh Seth's case), Gajendragadkar, J. (as he then was), after quoting the observations of Beaumont, C.J. in an earlier Full Bench decision of that Court observed:

Even so, this expression has acquired a well-recognised meaning in criminal law. If an act committed by an accused person constitutes an offence and if that act continues from day to day, then from day to day a fresh offence is committed by the accused so long as the act continues. Normally and in the ordinary course an offence is committed only once. But we may have offences which can be committed from day to day and it is offences falling in this latter category that are described as continuing offences."

[Emphasis supplied]

9. Again, the Tribunal is unable to agree with the submission of learned Counsel for the petitioners that 'merger' of the private respondents gives continuous cause of action to the petitioners. In fact, the limitation for filing claim petition will begin to run from the day, the merger order(s) was/were issued [*Sec. 9, Limitation Act, 1963*]. There is no continuous cause of action. There is no repetition of acts by the respondents. Merger of any person in a service takes place only once. If there was an Office Memorandum issued by the SAD in the year 2002, the petitioners ought to have availed the legal remedy

within the time frame, as provided in the statute. Even if they did not do so in the year 2003 or soon thereafter, the fact remains that they took recourse to the writ jurisdiction of Hon'ble High Court, who, in the year 2014 directed them to avail alternative remedy. The petitioners did not do so even at that point of time. They chose to come to this Tribunal only when an observation was made by the SAD in its order dated 11.08.2021 that they did not approach the Public Services Tribunal. This observation will not give them fresh cause of action.

10. Learned Counsel for the petitioners drew attention of this Tribunal towards Section 2(b) of the Limitation Act, 1963, to argue that 'application' includes a 'petition', but the Tribunal has noticed, at the same time, that the word 'Suit' does not include an 'appeal' or 'application', as has been mentioned in Section 2(l) of the Limitation Act, 1963.

11. Section 5(1)(b) provides that (although) the provisions of the Limitation Act, 1963, *mutatis mutandis* apply to reference under Section 4 as a reference were a suit filed in civil court, but continues to say, in the same vein, that notwithstanding the period of limitation prescribed in the Schedule to the said Act, the period of limitation for such reference shall be one year. Section 5(1)(b) is therefore, specific in the context of limitation before this Tribunal.

12. Sub-section (1) of Section 4 of the Act 1976 has used the language ".....a person who is or has been a public servant and is aggrieved by an order pertaining to a service matter within the jurisdiction of the Tribunal, may make a reference of claim to the Tribunal for the redressal of his grievance.

12.1 Statement of Objects and Reasons (SOR) reads as below:

".....Section 4 of the said Act provides that a person who is or has been a public servant and is aggrieved by an order pertaining to a service matter within the jurisdiction of the Tribunal may make reference of claim to the Tribunal for redressal of his grievance....."

12.2 Section 4-A of the Act has also used the words “references of claims” and “reference of claim” in Sub-section (1) and Clauses (a) & (b) to Sub-section (5) of such Section.

12.3 Clause (b) to Sub-section (1) of Section 5 of the Act has used the word “reference” in such clause. Sub-section (2) of Section 5 of the Act has also used the word “reference”. Sub Section (5-A) to Section 5 of the Act has also used the word ‘reference’ in its text.

12.4 Section 7 of the Act provides power to make Rules. Clause (c) to Sub-section (2) of Section 7 of the Act provides for “the form in which a reference of claim may be made.”

12.5 Furthermore, the Schedule appended to the Act has also used the words “reference of claim” or “references of claims”. Rule 4 of the Uttar Pradesh Public Services Tribunal (Procedure) Rules, 1992, provides for the following “(1) Every reference under Section 4 shall be addressed to the Tribunal and shall be made through a ‘petition’ presented in the Form-I by the petitioner.....(2) The petition under sub-rule (1) shall be presented.....”

12.6 The heading of Rule 5 is Presentation and scrutiny of petition.

12.7 Rules 4, 5, 6, 8, 16 etc. use the word ‘petition’, which, in fact, is a “reference”. The petition is only a medium of presentation. The Rules are always subordinate to the Act. The Rules are always supplementary. They are always read with the provisions of the Act. In a nutshell, a petition which is filed before this Tribunal is, in fact, a “reference of claim”.

12.8 ‘Petition’ According to New International Webster’s Comprehensive Dictionary, means “(1) a request, supplication, or prayer; a solemn or formal supplication (2) A formal request, written or printed, addressed to a person in authority and asking for some grant or benefit, the redress of a grievance, etc. (3) *Law* a formal application in writing made to a court,

requesting judicial action concerning some matter therein set forth (4) that which is requested or supplicated.”

13. Learned Counsel for the petitioners made a reference of Section 9 of the Limitation Act, 1963, according to which, “where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it.” Section 9, in fact, runs contrary to the interest of the petitioners of the instant case, inasmuch as, once O.M. of SAD came to their knowledge on 08.05.2002, the time (for limitation) has begun to run for them and, therefore, they should have filed the claim petition well on time, or, else, it would be time barred.

13.1 A reference of section 22 of Limitation Act, 1963 was also given. The same will not be attracted in the instant case, inasmuch as such section relates to continuing breaches of contract and torts. Instant case is neither, and cannot be, a case of breach of contract or breach of torts and, therefore, the benefit of Section 22 of the Limitation Act, 1963, cannot be given to the petitioners.

14. This Tribunal has held, in various other recent decisions that the petition filed by the petitioner before this Tribunal is neither a writ petition, nor appeal, nor application. It is just like a suit, as is evident from a bare reading of Section 5(1)(b) of the U.P. Public Services (Tribunal) Act, 1976 (for short, the Act). The words used in Section 5(1)(b) of the Act are- “.....as if a reference were a suit filed in Civil Court so, however, that-(i) notwithstanding the period of limitation prescribed in the Schedule to the Act (*Limitation Act, 1963*), the period of limitation for such reference shall be one year;”. It is not such claim petition in which the petitioner made a statutory representation or filed an appeal, revision or any other petition, in accordance with the Rules or orders relating to his conditions of service so as to exclude the period during which such representation, appeal or revision was pending (reference: Section 5(1)(b)(ii) of the Act).

15. Clause (b) to sub-section (1) of Section 5 of the Uttar Pradesh Public Services (Tribunal) Act, 1976 provides for limitation in respect of claim petitions filed before the Tribunal, which reads as below:

“(b) The provisions of the Limitation Act, 1963 (Act 36 of 1963) shall mutatis mutandis apply to the reference under Section 4 as if a reference were a suit filed in civil court so, however, that-

(i) Notwithstanding the period of limitation prescribed in the Schedule to the said Act, the period of limitation for such reference shall be one year;

(ii) In computing the period of limitation the period beginning with the date on which the public servant makes a representation or prefers an appeal, revision or any other petition (not being a memorial to the Governor), in accordance with the rules or orders regulating his conditions of service, and ending with the date on which such public servant has knowledge of the final order passed on such representation, appeal, revision or petition, as the case may be, shall be excluded:

Provided that any reference for which the period of limitation prescribed by the Limitation Act, 1963 is more than one year, a reference under Section 4 may be made within the period prescribed by that Act, or within one year next after the commencement of the Uttar Pradesh Public Services (Tribunals) (Amendment) Act, 1985 whichever period expires earlier;

.....”

[Emphasis supplied]

16. The period of limitation, therefore, in such reference is one year. In computing such period, the period beginning with the date on which the public servant makes a statutory representation or prefers an appeal, revision or any other petition and ending with the date on which such public servant has knowledge of the final order passed on such representation, appeal, revision or petition, as the case may be, shall be excluded.

17. It will be useful to quote Section 5 of the Limitation Act, 1963, as below:

“Extension of prescribed period in certain cases.—Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation.—The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.”

[Emphasis supplied]

18. It is apparent that Section 5 of the Limitation Act applies to appeals or applications (but not to applications under Order 21 CPC, *i.e.*, Execution of Decrees and Orders). Petitioners file claim petitions, pertaining to service matters, before this Tribunal. Claim petition is neither an appeal nor an application. It is a 'reference' under Section 4 of the Act, as if it is a suit filed in Civil Court, limitation for which is one year. It is, therefore, open to question whether Section 5 Limitation Act, 1963, has any application to the provisions of the Act [of 1976]. In writ jurisdiction, the practice of dealing with the issue of limitation is different. Also, there is no provision like Section 151 C.P.C. or Section 482 Cr.PC (inherent powers of the Court) in this enactment, except Rule 24 of the U.P. Public Services (Tribunal) (Procedure) Rules, 1992, which is only for giving effect to its orders or to prevent abuse of its process or to secure the ends of justice. It is settled law that inherent power cannot be exercised to nullify effect of any statutory provision.

19. This Tribunal is not exercising the jurisdiction under Article 226 of the Constitution. The Act of 1976 is self contained Code and Section 5 of such Act deals with the issue of limitation. There is no applicability of any other Act while interpreting Section 5 of the Act of 1976.

20. It may be noted here, only for academic purposes, that the language used in Section 21 of the Administrative Tribunals Act, 1985 (a Central Act) is different from Section 5 of the U.P. Public Services (Tribunal) Act, 1976 (a State Act). It is not a *pari materia* provision. Relevant distinguishing feature of the Central Act is being reproduced herein below for convenience:

*"21. Limitation- (1) A Tribunal shall not admit an application—
(a).....within one year from the date on which such final order has been made.*

(3) Notwithstanding anything contained in sub-section (1) or sub section (2), an application maybe admitted after the period of one year specified in clause (a) or clause (b) of sub-section (1) or, as the case may be, the period of six months specified in sub-section (2), if the applicant satisfies the Tribunal that he had sufficient cause for not making the application within such period."

[Emphasis supplied]

21. **It, therefore, follows that the extent of applicability of limitation law is self contained in Section 5 of the Uttar Pradesh Public Services (Tribunal) Act, 1976. Section 5 of the Act [of 1976] is the sole repository of the law on limitation in the context of claim petitions before this Tribunal.**

22. To recapitulate, as per the scheme of law, the Tribunal can consider the delay in filing the claim petition only within the limits of Section 5 of the Act [of 1976] and not otherwise. It may be noted here that the period of limitation, for a reference in this Tribunal, is one year. In computing the period of limitation, period beginning with the date on which the public servant makes a representation or prefers an appeal, revision or any other petition (not being a memorial to the Governor), in accordance with the rules or orders regulating his conditions of service, and ending with the date on which such public servant has knowledge of the final order passed on such representation, appeal, revision or petition, as the case may be, shall be excluded. Apart from that, this Tribunal is not empowered to condone the delay on any other ground, in filing a claim petition. It may also be noted here that delay could be condoned under Section 5 of the Limitation Act, 1963, only in respect of an appeal or an application in which the appellant or applicant is able to show sufficient cause for condoning such delay. A reference under the Act [of 1976] before this Tribunal is neither an appeal nor an application. Further, such power to condone the delay is available to a Tribunal constituted under the Administrative Tribunals Act, 1985. In such Tribunal, delay in filing application might be condoned under Section 21, "if the applicant satisfies the Tribunal that he/she had 'sufficient cause' for not making the application within such period." Since this Tribunal has not been constituted under the Administrative Tribunals Act, 1985 and has been constituted under the Uttar Pradesh Public Services (Tribunal) Act, 1976, in which there is no such provision to condone the delay on showing such sufficient cause, therefore, this Tribunal cannot condone the delay in filing a claim petition, howsoever reasonable one's plight may appear to be.

23. It may be reiterated, at the cost of repetition, that only a 'reference' is filed in this Tribunal, which is in the nature of a 'claim'. It is not a writ petition, for the same is filed before Constitutional Courts only. Limitation for filing a reference in the Act [of 1976] is one year, as if it is a suit. 'Suit' according to Section 2(l) of Limitation Act, 1963 does not include an application. As per Section 3 of the Limitation Act, 1963, every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed. Section 5 of the Limitation Act, 1963 has no applicability to 'references' filed before this tribunal. Section 5 of the Act of 1976 is self contained code for the purposes of limitation, for a 'reference' before this Tribunal.

24. The claim petition is, therefore, dismissed at the admission stage, as barred by limitation. No order as to costs.

(RAJEEV GUPTA)
VICE CHAIRMAN (A)

(JUSTICE U.C.DHYANI)
CHAIRMAN

DATE: DECEMBER 07, 2021
DEHRADUN
KNP