

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Appeal No. 200 of 2016**

Radheshyam Shukla S/o Shri Kanhai Prasad Shukla, Aged About 71 Years R/o Naya Sarkanda, Chatterjee Galli, Bilaspur, Tahsil And District Bilaspur Chhattisgarh

---- Appellant**Versus**

1. State Of Chhattisgarh Through The Secretary, Nagari And Vikas Department, Mahandi Bhawan, New Mantralaya, New Raipur Chhattisgarh.
2. Collector, Bilaspur, District Bilaspur Chhattisgarh Now Mungeli, District Mungeli Chhattisgarh.
3. Municipal Council, Through Chief Municipal Officer, Mungeli, Tahsil Mungeli, District Bilaspur Chhattisgarh Now Mungeli Chhattisgarh.

---- Respondents

For Appellant : Shri P.K.C.Tiwari, Senior Advocate with Shri Shashi Bhushan, Advocate.
 For Respondent/State : Shri Y.S.Thakur, Deputy Advocate General.

Hon'ble Shri Deepak Gupta, Chief Justice
Hon'ble Shri P. Sam Koshy, J.

Judgment on Board**Per Deepak Gupta, Chief Justice.****17/08/2016**

1. This appeal is directed against the judgment dated 15.03.2016 passed by learned Single Judge of this Court in Writ Petition No. 3115 of 2003 whereby he rejected the writ petition as being barred by principles of delay and laches.
2. The undisputed facts are that the writ petitioner Radhe Shyam Shukla was appointed as a Lower Division Clerk/Cashier on 10.02.1967 in Municipal Council, Mungeli. On 12.06.1969, the order (Annexure P/1 with the writ petition) was passed suspending the Petitioner on the allegation that the writ Petitioner

had embezzled some funds of the Municipal Council, Mungeli. It is also apparent that some disciplinary proceedings were initiated against the Petitioner and the memorandum of charges have been attached as Annexure P/2 to the petition. There is also a communication of the Petitioner on record dated 03.07.1970 in which he has stated that he would file his list of witnesses after the evidence of prosecution is led. Obviously, this application which is addressed to the President of Municipal Council relates to some disciplinary proceedings.

3. On 27.09.1975, an order was passed terminating services of the Petitioner on the ground that his service is no longer required. In the said order, it was also mentioned that in case the writ petitioner is found guilty by the Courts, then the amount which he had embezzled would be recovered from him or his guarantors and if necessary, by sale of his movable and immovable property. This order was never challenged by the Petitioner at that time. Two criminal cases were filed against the Petitioner. In one criminal case being 715 of 1969, he was acquitted vide judgment dated 16.11.1987. In the second criminal case, being Criminal Case No. 716 of 1969, the Petitioner was convicted by the trial Court on 28.08.1987. However, vide judgment dated 03.07.2002, passed in Criminal Appeal No. 287 of 1997, the Petitioner was acquitted in this case also.

4. Immediately after his acquittal, the Petitioner filed an application on 03.10.2002 seeking permission to resume his duties. He sent a reminder in this behalf on 08.11.2002. When he received no reply, he filed writ petition in this Court being Writ Petition No. 2635 of 2002. It appears that in this writ petition, an order was passed on 08.04.2003 directing the Respondents to decide representation of the writ petitioner within two months from the date of filing of representation. Therefore, it appears that this Court permitted the Petitioner to make a representation. This representation was rejected by the Municipal Council, Mungeli. Thereafter, the Petitioner has filed the present writ petition. The learned Single Judge rejected the writ petition on the ground that the

Petitioner had failed to give any explanation to explain the delay and laches which took place between 1975 and 2002.

5. Shri P.K.C.Tiwari, learned Senior Counsel has urged that the learned Single Judge sitting singly should not have virtually sat in judgment over the judgment passed by the co-ordinate Bench in the earlier writ petition. The second submission is that the order dated 27.09.1975 is on the face of it illegal and since it is an illegal order, delay and laches should not come in the way for setting aside the order. He also submits that in this case if relief is given to the Petitioner, no other person is going to be affected. It was urged that since the order is illegal, this Court should not perpetuate illegality only on the ground of delay and laches.

6. As far as the first submission is concerned, we are not at all in agreement with Shri Tiwari. The learned Single Judge while deciding the writ petition out of which this appeal arises, has in no manner sat over the judgment of the earlier order passed in writ petition. All that was decided in the earlier writ petition was the Petitioner was allowed to make a representation and if such representation was made, then it should be considered and decided within a period of two months. We fail to understand how passing of such an order can be taken to mean that the Court has condoned the delay.

7. The Court passed an innocuous order and that too, at the request of the Petitioner that his representation be decided.

8. In this regard, we may make reference to the judgment of the Apex Court in C.Jacob v. Director of Geology and Mining & Another {(2008) 10 SCC 115} wherein the Apex Court held as follows:

"8. Let us take the hypothetical case of an employee who is terminated from service in 1980. He does not challenge the termination. But nearly two decades later, say in the year 2000, he decides to challenge the termination. He is aware that any such challenge would be rejected at the threshold on the ground of delay (if the application is made before

Tribunal) or on the ground of delay and laches (if a writ petition is filed before a High Court). Therefore, instead of challenging the termination, he gives a representation requesting that he may be taken back to service. Normally, there will be considerable delay in replying such representations relating to old matters. Taking advantage of this position, the ex-employee files an application/writ petition before the Tribunal/High Court seeking a direction to the employer to consider and dispose of his representation. The Tribunals/High Courts routinely allow or dispose of such applications/petitions (many a time even without notice to the other side), without examining the matter on merits, with a direction to consider and dispose of the representation.

9. The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly they assume that a mere direction to consider and dispose of the representation does not involve any 'decision' on rights and obligations of parties. Little do they realize the consequences of such a direction to 'consider'. If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to 'consider'. If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The Tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored.

11. When a direction is issued by a court/tribunal to consider or deal with the representation, usually the directee (person directed) examines the matter on merits, being under the impression that failure to do may amount to disobedience. When an order is passed considering and rejecting the claim or representation, in compliance with direction of the court or tribunal, such an order does not revive the stale claim, nor amount to some kind of 'acknowledgment of a jural relationship' to give rise to a fresh cause of action.

14. We are constrained to refer to the several facets of the issue only to emphasize the need for circumspection and care in issuing directions for 'consideration'. If the representation is on the face of it is stale, or does not contain particulars to show that it is regarding a live claim, courts should desist from directing 'consideration' of such claims."

9. The Apex Court, in *C. Jacob (supra)* has clearly held that there was a practice where the parties would request the Court to dispose of the writ petition and since a so-called innocuous prayer was being made, the Court without going into merits of the case, just ordered that the representation be decided. In such cases, where the Court has not gone into the aspect of delay and laches, it cannot be said that the order directing the Petitioner to file a representation or the representation filed by him be decided, be understood to mean that the delay and laches, if any have been condoned. It may be better if the Court before passing such orders examine whether such an order should be passed or not. But merely because an order is passed that the representation be decided without making any observation on the issue of delay would not, in our opinion, mean that the Court has gone into the question of delay and has condoned the delay. Nor can this order mean that the objection of delay and laches has been waived by the Court or by the parties concerned.

10. We are in agreement with Shri Tiwari that the order dated 27.09.1975 appears to be an illegal order. Under the disciplinary rules, the services of a regular employee can only be terminated either on the basis of an enquiry or on the basis of conviction recorded. In the present case, there was no conviction and the criminal proceedings had only been initiated. Therefore, we may presume that the order was legally unsustainable. The principle of delay and laches is applicable even to such unsustainable or illegal order.

11. We must remember that the writ jurisdiction vested in this Court under Article 226 of the Constitution is an extraordinary jurisdiction. It is a discretionary jurisdiction. No doubt, the jurisdiction has to be exercised in a judicious manner but some of the principles which have been evolved in exercise of this jurisdiction are that the claims which are stale should not be entertained. It is now an accepted part of writ jurisprudence that the Court would refrain to grant relief to a client who is guilty of delay and laches and has been indolent in

pursuing the matter. In grant of extraordinary discretionary jurisdiction, the Court expects that the affected party should come to the Court at the earliest.

12. One of the principles with regard to delay and laches is that though there can be no hard and fast rule and each case should be decided on its own merits. Where limitation for filing a suit has expired then Writ Court would normally not exercise its extraordinary writ jurisdiction. In this behalf, reference may be made to the judgment of the Apex Court in *M.K. Krishnaswamy & Others vs. The Union of India and Others* (AIR 1973 SC 1168) and *Shri Vallabh Glass Works Ltd. and another vs. Union Of India and Others* (AIR 1984 SC 971) in which the Apex observed as follows:

"9. In regard to the relief of refund of excess duty paid in respect of the other goods, the case stands on an entirely different footing. This is a case where the Department had assessed the duty payable by the appellants under a wrong provision. The appellants were obliged to pay the duty so assessed. They did not, no doubt, question the assessments by taking a specific stand as they had done earlier in the case of wired glass. The appellants, however, questioned the validity of the levy only on February 20, 1976 on the ground that tariff Item 23A (1) of the First Schedule to the Act under which the duty has been levied was not applicable to the goods. While the Department refused to accept the said plea, the High Court has upheld it. In view of the decision of the High Court, the fact that the appellant had paid duty in excess of what they were bound in law to pay should be now taken as having been established. It is not disputed that if the appellants had filed a suit within the period of limitation the excess amount would have become refundable by virtue of Section 72 of the Indian Contract Act. Section 17(1)(c) of - the Limitation Act, 1963 provides that where in the case of any suit or application for which a period of limitation is prescribed under that Act, the suit or application is for relief from the consequence of a mistake, the period of limitation shall not begin to run until the plaintiff or applicant had discovered it or could have with reasonable diligence discovered it. In the instant case the date on which the mistake was discovered by the appellants or the date on which the appellants could with reasonable diligence have discovered it is not clear from the record before us. No efforts also was made in the course of the arguments urged on behalf of the appellants to establish it. We have, therefore, to assume that on the date each payment of excise duty made by the appellants in excess of the proper duty payable by them, the appellants could have discovered with due diligence that the duty claimed from them was excessive. Under Article 113 of the Limitation Act, 1963 which is applicable to this case, a suit for recovery of such excess duty had to be filed within three years from the date of

payment to the Department. But the appellants instead of filing a suit, first filed a writ petition in Special Civil Application No. 1365 of 1976 on September 28, 1976 and that petition had to be withdrawn in view of clause (3) of Article 226 of the Constitution as it stood then because the alternative remedy by way of an appeal was available. The appellants could, therefore, file the writ petition out of which the appeal arises only after the disposal of the revision petition by the Government of India as mentioned earlier. It is not disputed that the High Courts have power, for the purpose of enforcement of fundamental rights and statutory rights, to make consequential orders for repayment of money realised by the Government without the authority of law under Article 226 of the Constitution. This is an alternative remedy provided by the Constitution in addition to but not in supersession of the ordinary remedy by way of suit in the absence of any provision which would bar such a suit either expressly or by necessary implication. While there are different periods of limitation prescribed for the institution of different kinds of suits by the Limitation Act, 1963, there is no such period prescribed by law in respect of petitions filed under Article 226 of the Constitution. Whether relief should be granted to a petitioner under Article 226 of the Constitution where the cause of action had arisen in the remote past is a matter of sound judicial discretion governed by the doctrine of laches. Where a petitioner who could have availed of the alternative remedy by way of suit approaches the High Court under Article 226 of the Constitution, it is appropriate ordinarily to construe that any unexplained delay in the filing of the writ petition after the expiry of the period of limitation prescribed for filing a suit as unreasonable. This rule, however, cannot be a rigid formula. There may be cases where even a delay of a shorter period may be considered to be sufficient to refuse relief in a petition under Article 226 of the Constitution. There may also be cases where there may be circumstances which may persuade the court to grant relief even though the petition may have been filed beyond the period of limitation prescribed for a suit. Each case has to be judged on its own facts and circumstance touching the conduct of the parties, the change in situation, the prejudice which is likely to be caused to the opposite party or to the general public etc. In the instant case, the appellants had in fact approached the High Court on September 28, 1976 itself by filing Special Civil Application No. 1365 of 1976 for directing repayment of the excess duty paid by them. But no relief could be granted in that petition in view of the provisions of Article 226 of the Constitution as it stood then and the petition had to be withdrawn. Hence even granting that on the date of making each payment of excise duty in excess of the proper duty payable under law, the appellants should be deemed to have discovered the mistake, all such excess payments made on and after September 28, 1973 which would fall within the period of three years prior to the date on which Special Civil Application No. 1365 of 1976 was filed should have been ordered to be refunded under Article 226 of the Constitution. But the High Court declined to do so on grounds of estoppel and acquiescence. While we do agree that the appellants should not be granted any relief in respect of payment made between October 1, 1963 and September 27, 1973 which would fall

beyond three years from the date of the first writ petition filed in this case we do not find it proper and just to negative the claim of the appellants in respect of excess payments made after September 28, 1973. In the instant case the appellants had made excess payments on being assessed by the Department and such payments cannot be treated as voluntary payments precluding them from recovering them. (See Sales Tax officer, Banaras v. Kanhaiya Lal Mukundlal Saraf 1959 SCR 1350 : (AIR 1959 SC 135). We do not also find that the conduct of the appellants is of such a nature as would disentitle them to claim refund of excess payments made in respect of goods other than wired glass.)"

The order of termination was passed in the year 1975 and limitation for setting aside such order would be three years. This writ petition has been filed after 27 years. Therefore, the writ petition was miserably barred by principles of delay and laches.

13. Even if an order is illegal, it must be challenged within a reasonable time. Though there is no specific period of limitation prescribed under Article 226 of the Constitution, it is well settled law that where the Petitioner is guilty of laches for undue delay and does not give any satisfactory explanation to explain delay, he is not entitled to claim any relief. In this behalf reference may be made to the judgment of the Apex Court in State of Haryana and others vs. Ch. Bhajan Lal and others (AIR 1992 SC 604). There is plethora of judgments in this regard and they need not be multiplied. However, same view has been taken in many cases thereafter and this case still holds field.

14. The Petitioner in this case is not a rustic villager. This is a case of a person who was employed as a Lower Division Clerk/Cashier in the year 1967. He claims that his services were terminated in the year 1975 illegally. There is not even an iota of explanation as to why he did not file the writ petition till 2002 except to state that because the criminal cases were pending, he was waiting for the decision of the criminal cases. In fact, the order of 27.09.1975 can be said to be illegal only on the ground that the order has been passed without waiting for the criminal cases to attain fruition. If that be so, the Petitioner should have

challenged the order in the year 1975 itself. The writ court does not come to aid of those persons who sleep over their rights and do not approach the Court within a reasonable time. Therefore, we are not in agreement with Shri Tiwari.

15. The last submission of Shri Tiwari is that in such a case if relief is granted to the Petitioner, nobody else is affected. We cannot accept this submission. If relief is granted to the Petitioner, he would be deemed to be in service, he would get wages for the time he has not worked, claim money and other retiral benefits, like pension, gratuity etc. which would involve public funds and if the Petitioner does not approach this Court within a reasonable time, we are afraid that such a relief can be granted to him. When the Court decides the question with regard to delay and laches, it does not go into the merit of the case and merely because an order is illegal, does not grant the affected party a right to approach the Court after an unexplained delay.

16. Therefore we find no merit in this appeal. It is accordingly dismissed.

Sd/-
(Deepak Gupta)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE