

Jsn

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
REVIEW PETITION NO. 141 OF 2017
IN
WRIT PETITION NO. 8323 OF 2003**

Rupnawar Dhanaji Dinkar	... Petitioner
<i>Versus</i>	
Jai Bhavani Education Society & Ors.	... Respondents

Mr. A.N. Mulla, for the Petitioner.
Mr. Saurabh S. Kurade, i/b. Mr. Vijay Patil for Respondent Nos. 1 and 2.
Mr. A.P. Vanarase, AGP for State / Respondent Nos. 3 to 6.

CORAM:	SMT. VASANTI A NAIK AND MR. RIYAZ I. CHAGLA, JJ.
DATED:	30TH NOVEMBER 2017

PC:-

By this review petition, the petitioner seeks a review of the judgment dated 2nd November 2017 in writ petition no. 8323 of 2003.

It is stated on behalf of the petitioner that when the writ petition was called for hearing, the advocate for the petitioner could not attend the same as he was urgently required to go out of Mumbai for personal reason and the clerk of the advocate, could not assess the movement of the final hearing board due to miscalculation. It is stated that the clerk of the counsel for the petitioner had a *bonafide* belief that the matter may not reach on 2nd November 2017, with the result that nobody could appear before the Court. It is stated that when the appellant or his pleader is not present in the court when the appeal is called for

hearing, the Court cannot dismiss the appeal on merits. Reliance is placed on the judgment reported in 1996 (6) SCC 62 to substantiate the submission. It is submitted that this Court could not have dismissed the writ petition on merits when the petitioner and his counsel could not remain present in the Court when the writ petition was fixed for final hearing. It is stated that the Court was only empowered to dismiss the writ petition in default and the same could not have been dismissed on merits. It is submitted that the petitioner was working as a teacher with the respondent – management since the year 1992 and though he had worked for about 7 years in the school run by respondent – management he was not paid salary. It is stated that taking the work from the petitioner without payment of salary would result in exploitation of the petitioner and the same would be violative of the provisions of Article 23 of the Constitution of India. It is stated that some other colleagues of the petitioner, who were working as teachers in the same school had filed writ petition no. 1899 of 1999 and a direction was issued against the management to pay the salary to them. It is stated that similar relief ought to have been granted in favour of the petitioner. It is submitted that though a prayer for regularisation of the services of the petitioner was made, there is no consideration of the said prayer in the order that is sought to be reviewed. It is submitted that it is wrongly observed in the judgment that is sought to be reviewed, that a monetary claim cannot be made for a period of more than three years preceding the date of filing of the petition. It is stated that the law of limitation, providing for the period of limitation in respect of monetary relief would apply only to suits and not to writ petitions and writ petitions could be filed at any point of time to seek the

arrears of salary. It is stated that when salary was directed to be paid to the other teachers in the year 1999, similar relief ought to have been granted to the petitioners on parity.

Though we had asked the learned counsel to point out as to what was the error apparent on the face of record, and whether any incorrect statement was made in the judgment that is sought to be reviewed, there was no reply from the counsel for the petitioners that there is any mis-statement of fact in the judgment. However, the points that are mentioned hereinabove were argued by the learned counsel for seeking a review of the judgment. Reliance is placed by the learned counsel for the petitioner on the judgments reported in the case of ***P.C. Sethi & Ors. Vs. Union of India & Ors.***¹, ***Secretary, Deptt. Of Horticulture, Chandigarh & Anr. Vs. Raghu Raj***², ***Sanjit Roay V. State of Rajasthan***³ and ***Rajesh Kumar Vs. State of Uttarkhand & Ors.***⁴.

We have spent a lot of time hearing the counsel for the petitioner in this review petition though at the outset on the reading of the judgment that is sought to be reviewed we had found that there was no apparent error on the face of record, on which the same could be reviewed. However, at the cost of other litigants and the counsel who are waiting in the Court today, we had heard the learned counsel for the petitioner at length only due to his insistence. The first ground raised by the petitioner that the writ petition could not have been decided on merits if the counsel

1 AIR 1975 Supreme Court 2164.

2 AIR 2009 Supreme Court 514.

3 AIR 1983 Supreme Court 328.

4 (2009) 9 Supreme Court 640.

for the petitioner was not present in the Court is ill-founded and is liable to be rejected. When counsels do not appear when writ petitions are called for hearing, it would be for the Court to consider, after reading the writ petition and the grounds raised therein whether the writ petition could be decided on merits. If the Court finds that the assistance of the counsel on both the sides or counsel for the petitioner is not necessary the writ petition could be decided on merits. The embargo as stated on behalf of the petitioner would apply only to the appeals that are governed by the code of civil procedure. As per the amended provisions of Order 41 Rule 17 of the code of civil procedure, it is not permissible for an appellate court to dismiss the appeal on merits in the absence of the appellant or his counsel. Be that as it may, the provisions of Order 41 Rule 17 of the code of civil procedure are not strictly applicable to the writ petitions. The submission made on behalf of the petitioner that this Court was not empowered to decide the writ petition on merits is liable to be rejected. We find that the counsel for the parties who are eager to work out a matter at the admission stage are not present when the matters are taken up for hearing after a long lapse of time. In such a case, merely because the lawyers are not present in the Court, the Court is not expected to remain idle and it would be necessary for the Court to decide the writ petitions in which the assistance of the counsel is not necessary to ensure that the Court work goes on till the Court time is over. We therefore do not appreciate the submission made on behalf of the petitioner that the writ petition could not have been decided on merits and that it should have been dismissed only for default.

According to the petitioner, the petitioner had worked with the respondent only till the year 1999. The writ petition is filed in the year 2003. The claim made by the petitioner pertained to salary. It is well settled by the judgments of the Hon'ble Supreme Court that a monetary claim cannot be entertained in a writ petition unless the same is made for a maximum period of three years preceding the date of filing of the writ petition. This law would not be applicable only when the cause of action is continuous like in the case where the pension is not paid. In such cases also, the Hon'ble Supreme Court has held that the monetary relief in such cases would be restricted only for a period of three years preceding the date of filing of the petition. It would be worthwhile to refer to the judgment of the Hon'ble Supreme Court reported in **1997 (11) SCC 13, 2007 (9) SCC 274, 1995 (5) SCC 628 and 2008 (8) SCC 648** in this regard. In any case, claim for salary after termination of service cannot be a continuous cause of action. In the instant case, the petitioner had ceased to work with the respondent management in the year 1999 and the writ petition was filed in the year 2003. In a writ petition filed in the year 2003, the petitioner could have claimed salary from 2000 – 2003. However, the petitioner was not working with the respondent management in the year 2000. Considering these aspects of the matter, the Court had held that it would not be possible for the Court to consider granting salary to the petitioner.

There cannot be any parity between diligent and non-diligent litigants. In writ petition no. 1899 of 1999 the petitioners had approached the Court immediately and the Court had directed the respondent management to pay the salary to those petitioners.

The petitioner in the present case could also have followed suit and could have filed the writ petition in the year 1999 when he was dismissed from services. The petitioner however, filed the same in the year 2003 after he had ceased to work from the year 1999. The Supreme Court has held that there cannot be any parity between persons vigilant and non-vigilant in invoking protection of their rights. It would be necessary to refer to the judgments of the Hon'ble Supreme Court reported in **2006(11) SCC 464, 1997 (11) SCC 13, 2007 (9) SCC 274 and 1995 (5) SCC 628** in this regard. By abiding with the law laid down by the Hon'ble Supreme Court in the aforesaid judgments, we had decided the writ petition on merits.

It is canvassed on behalf of the petitioner that since the petitioner was making representations to the management seeking payment of salary and since the same was not paid, it cannot be said that the petition would suffer from delay or laches. The said submission is also proved to be wrong, by the judgments of the Hon'ble Supreme Court. The Hon'ble Supreme Court has held that making of successive representations is inconsequential while considering 'sufficient cause' as successive representations cannot stop limitation. It would be necessary to refer to the judgments reported in **1995 (Supp.) (9) SCC 593, 1997 (11) SCC 13, 2009 (3) SCC 281 and 2006 (4) SCC 322**.

As regards the prayer for regularisation, the said relief could not have been granted by this Court to the petitioner as the services of the petitioner were 'otherwise terminated'. He was not permitted by the respondent management to work since the year

1999. In such a case the petitioner could not have filed a writ petition seeking the regularisation of his services. An alternate remedy was available for the petitioner, if his services were 'otherwise terminated'. If the petitioner was not permitted by the management to work in the school, he should have filed an appeal before the School Tribunal under the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977. The petitioner however, chose not to do so and belatedly in the 2003, after the period of limitation for seeking the monetary or any other relief had expired, had approached this Court.

In the circumstances of the case though it was not necessary for the Court to hear the petitioner's counsel for long and pass a detailed order like the one in this review petition, since the learned counsel for the petitioner insisted that he would argue on the points that are referred to in this order, we thought it fit to note the same and record the reasons for rejecting the same, *albeit* at the cost of the other litigants. We find that the judgments reported in ***P.C. Sethi & Ors. (Supra), Secretary, Deptt. Of Horticulture, Chandigarh & Anr. (Supra), Sanjit Roy(Supra) and Rajesh Kumar (Supra)*** and relied on by the learned counsel for the petitioner are totally inapplicable to the points canvassed on behalf of the petitioner. They have no relevance to the points that are argued in this review petition.

In the circumstances of the case, we dismiss the review petition with costs.

(RIYAZ I. CHAGLA J.)

(SMT. VASANTI A. NAIK, J.)