

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.698 OF 2021

SANJAY RAJARAM KAKADE
VERSUS
STATE OF MAHARASHTRA AND OTHERS

Mr. S.R. Sapkal, Advocate for the petitioner;
Mrs. M.A. Deshpande, AGP for respondent no.1
Mr. R.A. Tambe, Advocate for respondent no.2.

**CORAM : DIPANKAR DATTA, CJ.
AND
SMT. VIBHA KANKANWADI, J.**

DATE : NOVEMBER 17, 2022

PC :

1. In this writ petition, dated 21.12.2020, the petitioner seeks the following relief:

“(B) To quash and set aside the orders dated 16.09.2018 passed by the Chief Executive Officer, Zilha Parishad, Aurangabad and order dated 15.7.2009 passed by respondent no.3 by issuing appropriate writ, order or direction as the case may be.

(c) To direct the respondent authorities to refund the amount of Rs.1,90,603/- which is recovered on the basis of order dated 16.09.2008 passed by the Chief Executive Officer, Zilha Parishad, Aurangabad and order dated 15.07.2009 passed by respondent no.3.

(D) To hold and declare that the petitioner is entitled for benefits of time bound promotional pay scale from 15.03.2005 by issuing appropriate writ, order or direction as the case may be.”

2. Preliminary objection to the maintainability of the writ petition is raised by Mr. Tambe, learned advocate for the respondent no.2. According to him, the writ petition suffers from gross delay and laches. Additionally, it is contended by him that no relief can be claimed by the petitioner against the order dated 16.09.2008 since the petitioner did not challenge the same in a previous round of litigation that he had initiated before this Court by instituting Writ Petition No. 7098 of 2018, which stands partly allowed by a judgment and order dated 22.03.2019 of this Court. In Writ Petition No.7098 of 2018, a subsequent order of recovery dated 12.04.2018 was made the subject-matter of challenge and the petitioner was granted relief on terms that the Zilla Parishad, Aurangabad is restrained from making recovery of actual excess payment wrongfully made to the petitioner by virtue of grant of time bound promotion scale before the date he was in fact entitled thereto.

3. As can be noticed from the prayers quoted above, an amount of Rs.1,90,603/- directed to be recovered from the petitioner by the order dated 16.09.2008 has already been recovered. We are informed that such recovery took place in 2011.

4. Although there was a subsequent order of recovery dated 12.04.2018, which was made the subject matter of challenge in Writ Petition No.7098 of 2018, the order dated 16.09.2008 impugned in this writ petition was neither challenged nor any

order was sought by the petitioner from the Court seeking refund of the amount of Rs.1,90,603/- recovered from him. We are of the considered opinion that the relief now claimed by the petitioner, apart from being grossly delayed bordering on laches, is barred by *res judicata* and/or analogous principles. We may profitably refer to the decision of the Supreme Court reported in **(1986) 1 SCC 100 [Forward Construction Company and others vs. Prabhat Mandal (Regd.) and others]**, wherein the principle of constructive *res judicata* under Explanation IV, Section 11 of the Code of Civil Procedure has been succinctly expressed in the following words: -

“20. So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to s.11 C.P.C. provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be

taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force."

4. In Writ Petition No.7098 of 2018, the petitioner ought to have challenged the order dated 16.09.2008 also apart from challenging the order dated 12.04.2018. Not having challenged the said order in the earlier writ petition, it must be deemed that the order dated 16.09.2008 was under challenge but the Court had refrained from granting any relief to the petitioner *qua* such order. The petitioner is precluded in law by reason of Section 11 of the Code of Civil Procedure from raising an issue/claim which he could have raised in the earlier round of litigation but did not actually raise; however, the effect of the law is that the issue/claim is deemed to have been raised and decided.

5. We have our sympathies for the petitioner, a Class III employee; however, writ jurisdiction is not exercised on sympathetic considerations.

6. For the reasons aforesaid, this writ petition is held not maintainable and, accordingly, stands dismissed. No costs.

[SMT. VIBHA KANKANWADI, J.]
amj

[CHIEF JUSTICE]