CONSTITUTIONAL WRIT

Present : The Hon'ble Justice Dipankar Datta

Judgment on : 10.6.2010

W.P. 6706 (W) of 2010

Suniti Kumar Mishra

…Petitioner

Versus

State of West Bengal & ors.

…Respondents

***POINT* :-**

Money claim – Works done in 1988 as a carriage contractor – Writ Petition filed in 2007 – Respondents were directed to consider the representation – Application for contempt – Relevent papers were not found because of the age of the claim – Delay – Duty of the court before passing an order for consideration of the representation of the petitioner – Constitution of India, Article 226.

***FACTS* :-**

The petitioner have been engaged by the respondents as carriage contractor for transportation of cement from the departmental godowns to various sites as per their orders. He had the orders issued by the respondents from time to time in the year 1988 and had raised separate bills in sums of Rs.17,000/- and Rs. 68,160/-. The respondents did not release payment payable to the petitioner. The petitioner did not exercise his right to obtain payment for work executed by him. Nearly 18 years after he had executed the work, he woke up from his slumber and presented a writ petition before this Court being W.P. No.21620 (W) of 2007 praying for order on the to release payment in his favour.

The respondents were directed by The Hon'ble High Court by an order dated 15.1.2008 to consider the representations made by the petitioner in support of his claim for release of payment in accordance with law. A contempt petition followed alleging deliberate non compliance of the order dated 15.1.2008. Acting in compliance with the said order, the Assistant engineer questioned in the present petition dated 31.3.2010 after disposal of the

contempt petition on 5.9.2009. The Assistant Engineer in the impugned order has expressed that the matter being extremely old, relevant papers have not been found and that on the basis of the papers furnished by the petitioner he has worked out Rs.13,896/- as due and payable to the petitioner out of the claimed amount of Rs. 17,000/-. So far as the other claim in a sum of Rs.68,160/- is concerned, the Assistant Engineer forwarded the matter for consideration by the competent authority.

HELD **:-**

A claim for money which was undisputedly due in 1988 if the petitioner's case is to be believed, was sought to be enforced in 2007. Even if the petitioner had filed a money suit instead of preferring the earlier writ petition, the same would have definitely been dismissed as barred by limitation. The fact that bills were raised by the petitioner pertaining to work executed by him in 1988 was overlooked resulting in a direction being issued upon the Assistant Engineer to consider his claim.

Para 5

Apart from any other point, the writ petition filed by the petitioner in 2007 was grossly delayed and raised a stale dispute dating back to 1988. In view of the decisions in C. Jacob v. Director of Geology and Mining, (2008)10 SCC 115, & (2010) 2 WBLR (SC) 373, Union of India & ors. vs. M.K. Sarkar, the issue of delay and laches in approaching a Court of Writ has to be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a Court's direction. Delay and/or laches is neither erased by the direction of Court to consider nor by the order passed by the administrative authority in compliance therewith. On the authority of the above decisions and in the absence of any explanation worth the name for the delay and laches in approaching the Court of Writ in 2007, the challenge to the order of the Assistant Engineer is unworthy of being entertained by this Court at this distant point of time. It is settled law that extraordinary writ powers are to be exercised only if the Court is approached within a reasonable period of time. The petitioner having slept over his right for years together cannot now seek to question the order of the Assistant Engineer which would not have come into existence but for the order of Court dated 15.1.2008. Such order does not erase the delay and laches in approaching Court and the impugned order is not to be considered as furnishing a fresh cause of action for reviving the disputed time barred issue. Para 6

CASES CITED :-

1) C. Jacob v. Director of Geology and Mining, (2008)10 SCC 115,

2) (2010) 2 WBLR (SC) 373, Union of India & ors. vs. M.K. Sarkar

For the petitioners : Mr. Sankar Prasad Dalapati,

For the official respondents : Mr. Subrata Mukhopadhyay
Mr. M.K. Sardar

THE COURT .1)The petitioner claims to have been engaged by the respondents as carriage contractor for transportation of cement from the departmental godowns to various sites as per their orders. He had implemented the orders issued by the respondents from time to time in the year 1988 and had raised separate bills in sums of Rs.17,000/- and Rs. 68,160/-. The respondents did not release payment allegedly due and payable to the petitioner. The petitioner did not exercise his right to obtain payment for work executed by him. Nearly 18 years after he had executed the work, he woke up from his slumber and presented a writ petition before this Court being W.P. No.21620 (W) of 2007 praying for order on the respondents to release payment in his favour. I had the occasion to dispose of the writ petition by an order dated 15.1.2008. The respondents were directed to consider the representations made by the petitioner in support of his claim for release of payment in accordance with law.

2)A contempt petition followed alleging deliberate non-compliance of the order dated 15.1.2008. Acting in compliance with the said order, the Assistant Engineer, respondent no.4 has passed an order dated 10.6.2009

which has been questioned in the present petition dated 31.3.2010 after disposal of the contempt petition on 5.9.2009. The Assistant Engineer in the impugned order has expressed that the matter being extremely old, relevant papers have not been found and that on the basis of the papers furnished by the petitioner he has worked out Rs.13,896/- as due and payable to the petitioner out of the claimed amount of Rs. 17,000/-. So far as the other claim in a sum of Rs.68,160/- is concerned, the Assistant Engineer forwarded the matter for consideration by the competent authority.

3)The ill-effects that a direction for consideration of representation without examining the claims raised on merits may bring about have been considered in some detail by the Supreme Court in C. Jacob v. Director of Geology and Mining, (2008)10 SCC 115, wherein it was ruled 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 to 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 realise 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.

10. Every representation to the Government for relief, may not be replied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the Department, the reply may be only to inform that the matter did not concern the Department or to inform the appropriate Department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations, cannot furnish a fresh cause of action or revive a stale or dead claim.

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 so 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 "acknowledgement of a jural relationship" to give rise to a fresh cause of action.

12. When a government servant abandons service to take up alternative employment or to attend to personal affairs, and does not bother to send any letter seeking leave or letter of resignation or letter of voluntary retirement, and the records do not show that he is treated as being in service, he cannot after two decades, represent that he should be taken back to duty. Nor can such employee be treated as having continued in service, thereby deeming the entire period as qualifying service for the purpose of pension. That will be a travesty of justice.

13. Where an employee unauthorisedly absents himself and suddenly appears after 20 years and demands that he should be taken back and approaches the court, the department naturally will not or may not have any record relating to the employee at that distance of time. In such cases, when

the employer fails to produce the records of the enquiry and the order of dismissal/removal, court cannot draw an adverse inference against the employer for not producing records, nor direct reinstatement with back wages for 20 years, ignoring the cessation of service or the lucrative alternative employment of the employee. Misplaced sympathy in such matters will encourage indiscipline, lead to unjust enrichment of the employee at fault and result in drain of public exchequer. Many a time there is also no application of mind as to the extent of financial burden, as a result of a routine order for back wages.

14. We are constrained to refer to the several facets of the issue only to emphasise the need for circumspection and care in issuing directions for 'consideration'. If the representation 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."

4)Considering the said decision, the Supreme Court yet again in its recent decision reported in (2010) 2 WBLR (SC) 373, Union of India & ors. vs. M.K. Sarkar has held as follows :

"When a belated representation in regard to a 'stale' or 'dead' issue/dispute is considered and decided, in compliance with a direction by the Court/Tribunal to do so, the date of such decision can not be considered as furnishing a fresh cause of action for reviving the 'dead' issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a Court's direction. Neither a Court's decision to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches. A Court or Tribunal, before directing 'consideration' of a claim or representation should examine whether the claim or representation is with reference to a 'live' issue or whether it is with reference to a 'dead' or 'stale' issue. If it is with reference to a 'dead' or 'stale' issue or dispute, the Court/Tribunal should put an end to the matter and should not direct consideration or reconsideration. If the Court or Tribunal deciding to direct 'consideration' without itself examining of the merits, it should make it clear that such consideration will be without prejudice to any contention relating to limitation or delay and laches. Even if the Court does not expressly say so that would be the legal position and effect."

5)I have no hesitation in recording that the order dated 15.1.2008 ought not to have been passed keeping in mind the enormous delay on the part of the petitioner in trying to enforce his claim for payment of money. It was clearly overlooked that a claim for money which undisputedly became due in 1988, if the petitioner's case is to be believed, was sought to be enforced in 2007. Even if the petitioner had filed a money suit instead of preferring the earlier writ petition, the same would have definitely been dismissed as barred by limitation. The fact that bills were raised by the petitioner pertaining to work executed by him in 1988 was overlooked resulting in a direction being issued upon the Assistant Engineer to consider his claim.

6)Apart from any other point, the writ petition filed by the petitioner in 2007 was grossly delayed and raised a stale dispute dating back to 1988. In view of the decisions in C. Jacob (supra) and M.K. Sarkar (supra), the issue of delay and laches in approaching a Court of Writ has to be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a Court's direction. Delay and/or laches is neither erased by the direction of Court to consider nor by the order passed by the administrative authority in compliance therewith. On the authority of the above decisions and in the absence of any explanation worth the name for the delay and laches in approaching the Court of Writ in 2007, I hold that the challenge to the order of the Assistant Engineer is unworthy of being entertained by this Court at this distant point of time. It is settled law that extraordinary writ powers are to be exercised only if the Court is approached within a reasonable period of time. The petitioner having slept over his right for years together cannot now seek to question the order of the Assistant Engineer which would not have come into existence but for the order of Court dated 15.1.2008. Such order does not erase the delay and laches in approaching Court and the impugned order is not to be considered as furnishing a fresh cause of action for reviving the disputed time barred issue.

7)Applying the doctrine of *actus curiae neminen gravabit*, I hold that the respondents should not be held liable to make payment of even the admitted claim which apparently does not appear to have been reached based on all the relevant documents. No Mandamus can thus issue.

8)The writ petition, accordingly, stands dismissed.

9)There shall be no order as to costs.

10)This order of dismissal, however, shall not preclude the respondents to make payment of the admitted claim, if they so choose.

11)Urgent photostat certified copy of this judgment and order, if applied for, shall be given to the applicant as early as possible.

(DIPANKAR DATTA, J.)