HIGH COURT OF JAMMU AND KASHMIR

AT JAMMU

Case: SWP No.1012/2007

Date of Order : 26.07.2016

Vijay Kumar.	vs	State and ors.

Coram:

Hon'ble Mr. Justice B.S.Walia, Judge

Appearing counsel:

For Petitioner(s) : Mr. Sachin Sharma Advocate.

For Respondent(s) : Mr. W.S.Nargal AAG.

i/	Whether to be approved for reporting in Digest/Journal	:	Yes
ii/	Whether to be approved for reporting in Press/Media.	:	Yes

Judgment :

1. Writ petition seeks quashing of order No. 278 of 2002 dated 08.02.2002 i.e. **Annexure J** whereby petitioner who was working as a Constable in the J&K Police was discharged from service as also for quashing of order No.314 of 2002 dated 24.10.2002 i.e. **Annexure K** passed by the Deputy Inspector General of Police dismissing the mercy petition filed against the order discharging the petitioner from service. Prayer is also for the issuance of a writ, order or direction especially in the nature of Mandamus commanding the respondents to reinstate the petitioner in service w.e.f. 08.02.2002 with all consequential benefits.

2. Brief facts of the case leading to the filing of the writ petition are that pursuant to his recruitment as a Constable vide order No. 674 of 2000 dated 09.6.2000 i.e. Annexure A, the petitioner, joined service at District Police Line's Jammu. Pursuant to order No. 18310-15/DPOB dated 18.08.2000 deputing the petitioner for basic training course, the petitioner reported at Police Training

College, Sheri Baramulla, Srinagar (hereinafter referred to as the College) on the same day.

3. That as further averred in the writ petition, after joining the College, the petitioner fell ill, therefore approached his Ustaad to get him medically treated or in the alternative, to grant him leave, but no heed was paid to his request nor was it possible for him to avail treatment from outside the Police Training College. Consequentially, on oral permission being granted by his Ustaad, the petitioner proceeded home and got himself treated at Sub District Hospital Bishnah from 23rd August 2000 till his recovery on 3rd September, 2000 **(**Medical certificate Annexure B for the period 23.08.2000 to 03.09.2000 is handwritten and does not bear any number of registration of the petitioner for treatment at the hospital concerned nor contains any endorsement number**)** where after he proceeded to the Police Line's to collect his salary on 4th September, 2000. However, salary was not paid to him. Thereupon, the petitioner proceeded to the College but was not allowed to join and was instead discharged from the College. The petitioner thereafter suffered from pain in the neck and right leg (Medical certificate Annexure E for the period 17.09.2000 to 18.05.2001 is also handwritten besides does not bear any number of registration of the petitioner for treatment at the hospital concerned nor contains any endorsement number**)**. Eventually vide order No.294 of 2000 dated 25.10.2000 i.e. Annexure D, passed by the Senior Superintendent of Police, Jammu, the petitioner was discharged from service.

4. That appeal against order Annexure-D was accepted by the Deputy Inspector General of Police vide order No. 482 of 2001 dated 08.09.2001, petitioner was reinstated and Senior Superintendent

of Police, Border was directed to hold a fresh Departmental Enquiry as per Rules. Pursuant thereto, the petitioner was served summary of allegations followed by charge -sheet Annexure-G to which he submitted reply- Annexure-H.

5. Grievance of the petitioner is that pursuant to the fresh Departmental Enquiry, the Enquiry Officer forwarded enquiry report along with recommendations to respondent No.5, who while concurring with the same ordered his discharge from service vide order No. 278 of 2002 dated 08.02.2002 i.e. **Annexure-J** and ordered treating period of absence as dies-non without recording any evidence or giving any opportunity to him to adduce any evidence in defence, that although the word used in the impugned order was discharge, yet the same had to be construed as removal since the same did not debar him from service. Appeal i.e. mercy petition filed by the petitioner before the DIG Jammu was rejected vide order No.314 of 2002 dated 24.10.2002 i.e. **Annexure K**. Representation against rejection of the mercy petition was submitted by the petitioners father to respondent No.4, who forwarded the same to respondent No.3 vide communication dated 21.01.2004 i.e. Annexure L by observing therein that the representation of the petitioners father had already been examined and consigned to record having no force. Respondent No.3, in turn, forwarded the same to respondent No.2 vide communication dated 11.03.2004 but no action was taken on the same.

6. That the writ petition has been filed on the following grounds :

i) Enquiry had not been conducted as per procedure laid down in Chapter 9 of the J & K Police Manual ;

ii) Although respondent No.4 had passed order No.278 of

2002 dated 18.02.2002 i.e. Annexure J discharging the petitioner from service, yet the order was one of removal since the same did not debar the petitioner from reemployment in Government Service and in-terms of Rule 335 of the J&K Police Manual, order of removal could only be passed by the Deputy Inspector General of Police. Consequently, the order passed by respondent No.4 was without authority of law ;

iii) In terms of Rule 208 (g), absence without leave or absence after the end of the leave entailed loss of appointment except in case of ill health in which situation the absentee was required to produce medical certificate from the Medical Officer. Although the petitioner had submitted medical certificate, the same had been brushed aside in violation of the principles of Natural Justice ;

iv) In terms of Rule 336, punishment was required to be commensurate with the default, sufficient to act as a deterrent without being unduly harsh ;

v) Respondent No.4 had not appreciated the fact that the petitioner was the sole earning member of his family which was dependant on him.

7. That on behalf of the respondents, preliminary objections have been taken that the petitioner had raised disputed questions of fact, that too after a lapse of more than five years, the writ petition was barred by delay and laches and liable to be dismissed as such, no fundamental, legal or statutory right of the petitioner had been violated, that as per Rule 187 of the J & K Police Manual, a Constable who was found unlikely to prove to be an efficient police officer was liable to be discharged by the Superintendent within three years of enrolment, Rule 359(10) clearly envisaged that the

procedure prescribed under Rule 359 would not be applicable in case it was proposed to discharge the services of a probationer, the petitioner was discharged from service after conducting a full fledged inquiry and affording him opportunity to defend himself in accordance with the principles of natural justice, that it was incorrect that the petitioner was ever permitted to proceed home for treatment, the impugned order had been passed in accordance with the rules applicable as well as principles of Natural Justice etc. In the aforementioned background, prayer was for dismissal of the writ petition.

8. That a perusal of the impugned order reveals that the petitioners name was struck off from the College on account of unauthorized absence and eventually he was discharged from service by the Senior Superintendent of Police vide order No. 294 of 2000 dated 25.10.2000, but on appeal, was reinstated vide Order No.482 of 2001 dated 08.09.2001 with orders for conduct of fresh departmental enquiry. Pursuant thereto, enquiry was conducted by the Dy. SP. Hqrs., Border, who submitted report along with recommendation for removal of the petitioner from service on the ground that he was not likely to prove to be a good police official. Pursuant thereto, the Sr. Superintendent of Police ordered discharge of the petitioner from service with immediate effect on the ground that he was not likely to prove to be a good police officer while the period of absence w.e.f. 21.08.2001 to 28.08.2001 was treated as dies non.

9. That at the time of arguments, emphasis was placed on submission that in terms of Rule 359 read with Rule 334, a police officer could not be discharged from service after a regular enquiry, but could only be dismissed or removed and that order of

discharge could only be under Rule 187, that although the petitioner was discharged from service on account of having remained un-authorisedly absent, in fact, he was prevented by sufficient and reasonable cause from being present, that as per Rule 208 (g) of the Police Rules, absence without leave involved loss of appointment except when the absentee produced a certificate of a Medical Officer which despite having been produced had been brushed aside, that the punishment awarded was very harsh etc.

10. That Mr. W.S.Nargal, learned Additional Advocate General has on the other hand argued that the petition is liable to be dismissed on the short ground of delay and laches, that Rules had been followed and impugned order was in accordance with law, therefore immune from challenge. Learned AAG contended that on 08.10.2013 the matter was heard at length but on plea of delay and laches being raised as preliminary objection, learned counsel for the petitioner had sought time to address the same but had failed to give explanation what to talk of explanation acceptable in the eyes of law in respect thereto, therefore the petition was liable to be dismissed on ground of delay and laches. Order of this Court dated 08.10.2013 is reproduced hereunder:-

> "The matter was heard at length. One of the preliminary objections raised by learned counsel for the respondents, Mr. Gagan Basotra, was that the petition was barred by delay and laches and inasmuch as the order impugned dated 8th of February, 2002 has been challenged in the present petition in the year 2007. On this, learned counsel for the petitioner sought some time to address the court on the issue of laches. List in the 1st week of November, 2013.
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> Sd/- Judge "

11. Learned AAG has relied on a decision of a Division Bench of this Court in LPASW No. 188/2003, decided on 23.07.2015 in case titled State of J&K & ors versus Mohammed Saleem wherein the question of delay and laches in a similar case was considered and it was held that unexplained delay and laches were fatal to the maintainability of writ petition and such a writ petition was liable to be dismissed on the said short ground alone. Relevant extract of the aforementioned judgment is reproduced hereunder:

> "12. In Tukaram Kana Joshi vs. MIDC & ors AIR 2013 SC 565 relied upon by the learned appellant's counsel, the Supreme Court has indicated the circumstances in which a time barred claim suffering from delay and laches can still be entertained. Their Lordships after referring to series of decisions of the Supreme Court have held in para 12 :
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> > "No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, they should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred for the other side cannot claim to have a vested right in the injustice being done, because of non deliberate delay. The court should not harm innocent parties if their rights have in fact emerged, by delay on the part of the petitioners."
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> 13.What is manifest from the Constitution Bench Judgment in Bhailal Bhai and the latest judgment in Tukaram Kana Joshi is that as a general rule if a writ petition under Article 226 of the Constitution suffers from delay and laches, the High Court ought not ordinarily entertain such a petition and lend its aid to the party guilty of such delay and laches. Nonetheless a question of condoning the delay can be accorded consideration depending upon facts of a given case and result would differ from case to case. If sufficient circumstances and bonafide grounds

for the petitioner's failure to approach the Court for a considerable time are made out, delay may be condoned.

Underlining by undersigned.

14. The petitioner, a member of Belt force, did not report back to duty after availing a days casual leave, did not seek extension of leave, absented from duty without leave and did not report back or avail any remedy, if there was any hindrance in reporting back, for more than a decade. He approached the writ court without making out a case justifying his failure to do so all along. This important aspect of the case should not have been ignored by the learned writ court and the petition, firstly should not have been admitted without addressing the delay and even if admitted, question should have got priority while finally disposing of the same.

Underlining by undersigned.

15. What has been urged with vehemence by the learned respondents counsel is that the question of delay cannot be raised once a writ petition is admitted. Reliance has been placed on decision of coordinate Bench of this Court in Bashir Ahmed Bhat's case, 2004 (3) JKJ 189 and subsequent decision in Abdul Ghani's case, 2013 (2) JKJ 140. It is similarly urged that the cause of action accrued to the petitioner after the representation submitted by him in the year 2009 fell on the deaf ears of the respondents.

16. The decision in Abdul Ghani's case is based on the decision in Bashir Ahmed Bhat's case. In Bashir Ahmed Bhat's case, Division Bench of this Court has observed primarily :

"…There is no doubt that if a person who has a cause of action does not come to the court within reasonable time, he in law waives or loses his right by his conduct. But there is exception to it that if the aggrieved person is prevented by some circumstances to approach the Court and submits there for the plausible and convincing explanation which prevented him to come to the court, in that event, his right does not die and if the Court accepts that explanation, he can agitate and enforce his right"

Learned Division Bench has also observed that :

"It is also the proposition of law that delay and laches should be considered before admission of writ petition. The petition has not been admitted subject to delay and laches, which were not pressed at the time of its admission. Therefore, the writ petition under such circumstances cannot be dismissed on account of delay and laches"

17. It be noticed that learned Division Bench in Bashir Ahmed Bhat's case has conspicuously upheld the legal consequence of delay and laches on the claim of a person, which is that the person guilty of such delay and laches loses his right to remedy unless he shows a satisfactory and plausible reason for such delay and laches. Decision of the Constitution Bench in Bhailal Bhai's case would make it clear that a duty is cast on the writ court not to entertain a writ petition if it suffers from unreasonable and unexplained delay and laches as it has been held that the Court ought not ordinarily to lend its aid. Observations of the learned Division Bench in Bashir Ahmed Bhat's case that delay and laches should be considered before admission of the writ petition cannot be said to have laid down the law that question relating to the doctrine of delay and laches cannot be raised in appeal if the same was not raised before or considered by the writ court particularly when a writ petition was admitted without notice to respondents. This aspect would be clear from a later decision of the Supreme Court dated 23.08.2013 in State of Uttaranchal and anr vs. Shiv Charan Singh Bhandari and ors., 2013 (11) SCALE 56 where the Supreme Court has further held that the representation at a later stage does not revive a dead and stale cause of action.

18.xxx19.

20. The issue taken up for determination by the Supreme Court was 'whether the respondents could have been allowed to maintain the petition before the Tribunal after lapse of two decades……

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22. For all that said and discussed above and in view of the well settled legal principles, we hold that the respondent could well have approached this Court or any other competent court or forum if he was not allowed to resume duty or immediately after the issue of the termination order dated 04.07.1991. The writ petition filed by the respondent in the year 2001 suffered from unexplained delay of more than a decade and was hit by the doctrine of delay and laches. Such a writ petition did not deserve to be admitted and should not have been entertained by the learned Writ Court that too without notice to the respondents and ignoring the delay. In any case appellants are not barred from raising the question of delay in this appeal. The impugned judgment and order therefore, cannot sustain as the writ petition was hit by the doctrine of delay and laches. This appeal, therefore, succeeds on that score alone and we do not feel the necessity

of taking up the other grounds urged by the appellant."

12. Hon'ble Supreme Court in **Chennai Metropolitan Water Supply & Sewerage Board vs. T.T.Murali Babu, (2014) 4 SCC 108** considered effect of delay on maintainability of a writ petition and was pleased to hold as under :

> " 13. First, we shall deal with the facet of delay. In Maharashtra SRTC v. Balwant Regular Motor Service the Court referred to the principle that has been stated by Sir Barnes Peacock in Lindsay Petroleum Co. v. Hurd, which is as follows: (Balwant Regular Motor Service case, AIR pp. 335-36, para 11)
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> > "11. ... 'Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in, either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.' (Lindsay Petroleum Co. case, PC pp. 239-40)"
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> 14. In State of Maharashtra v. Digambar, while dealing with exercise of power of the High Court under Article 226 of the Constitution, the Court observed that : (SCC p. 692, para 19)
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> > "19. Power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is for that reason, a

> person's entitlement for relief from a High Court under Article 226 of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy conduct of the person seeking relief, and the court refuses to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blameworthy conduct."

15. In State of M.P. v. Nandlal Jaiswal the Court observed that: (SCC p. 594, para 24)

> "24. … it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic."

It has been further stated therein that : (Nandlal Jaiswal case, SCC p. 594, para 24)

> "24. … If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction."

Emphasis was laid on the principle of delay and laches stating that resort to the extraordinary remedy under the writ jurisdiction at a belated stage is likely to cause confusion and public inconvenience and bring in injustice.

16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the court would be under legal obligation to scrutinise whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only

invite disaster for the litigant who knocks at the doors of the court. Delay reflects inactivity and inaction on the part of a litigant — a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis.

17. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinise whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons — who compete with "Kumbhakarna" or for that matter "Rip Van Winkle". In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold. "

We respectfully reiterate the said feeling and re-state with the hope that employees in any organization should adhere to discipline for not only achieving personal excellence but for collective good of an organization. When we say this, we may not be understood to have stated that the employers should be harsh to impose grave punishment on any misconduct. An amiable atmosphere in an organization develops the work culture and the employer and the employees are expected to remember the same as a precious value for systemic development.

34. Judged on the anvil of the aforesaid premises, the irresistible conclusion is that the interference by the High Court with the punishment is totally unwarranted and unsustainable, and further the High Court was wholly unjustified in entertaining the writ petition after a lapse of four years. The result

> of aforesaid analysis would entail overturning the judgments and orders passed by the learned single Judge and the Division Bench of the High Court and, accordingly, we so do."

13. I have considered the submissions made by learned counsel for the parties and perused the record. A perusal of impugned order **Annexure J** reveals that the same is dated 08.02.2002. Appeal / Mercy petition filed by the petitioner against the same was dismissed vide order **Annexure K** dated 24.10.2002. However, the writ petition has been filed on 24.05.2007 i.e. close to 5 years after the passing of the impugned order upholding the order of the disciplinary authority. No explanation has been given for the delay in invoking the jurisdiction of the High Court after an inordinate and unexplained delay of 5 years from the date of accrual of cause of action. Therefore the claim is clearly hit by delay and laches.

14. Hon'ble Supreme Court in **State of Kerala v. A.K. Gopakumar, (2013) 11 SCC 606** held that the High Court would be justified in refusing to entertain writ petition where the same is filed without giving explanation for delay in challenging the impugned order. Relevant extract of the same is reproduced hereunder :

> " 9. It is also apposite to note that the writ petition filed by the respondent on 15-3-2010 was highly belated and the High Court would have been fully justified in refusing to entertain the respondent’s prayer because he had not offered any explanation for the time gap of 2 years and 8 months between the issue of the order of dismissal and filing of the writ petition."

15. That no-doubt, the petitioner's father represented to respondent No. 4 against the order Annexure K dated 24.10.2002 dismissing the mercy petition filed by the petitioner. However, perusal of communication Annexure L reveals that the petitioner's fathers representation for sympathetic view was also examined and consigned to record on account of the same being bereft of merit

and it was in the said circumstances that respondent No.4 forwarded the representation to respondent No.3 who also rejected the same. The Commissioner, Home Department was merely apprised of the impugned order. Representation by the petitioners father would not have the effect of obliterating delay in challenging the impugned order Annexure J & K since a repeated representation's for sympathetic consideration are not provided for under the rules. Mere filing of representation by petitioner's father after rejection of the mercy petition of the petitioner vide order Annexure K dated 24.10.2002 would not have the effect of extending limitation and the petitioner ought to have challenged the impugned orders at the earliest. Once the petitioners mercy petition had been rejected, the petitioner ought to have invoked the jurisdiction of the High Court expeditiously. However, after the lapse of close to one and a half year after rejection of the petitioners mercy petition, the petitioners father filed a representation for sympathetic consideration. The same did not meet with success. However, the petitioner challenged the impugned orders **Annexure J** dated 08.02.2002 as also **Annexure K** dated 24.10.2002 only after a lapse of close to 5 years by way of writ petition on 24.05.2007. Therefore, it is clear that the writ petition is hit by delay and laches. Apart from the delay in invoking the jurisdiction of this Court, that too without offering any explanation for the delay in approaching the Court, the background of the petitioner belonging to a disciplined force and admittedly having absented without sanctioned leave cannot be lost sight of. Perusal of order Annexure K also reveals that despite repeated series of signals from the SSP Border at the petitioners home address to resume duty at DPL Border, the petitioner did not bother to resume duty. Since the petitioner was a member of a

disciplined force, it was all the more incumbent upon him to adhere to discipline not only for achieving personal excellence but also for the collective good of the force and the Nation.

16. Learned counsel for the petitioner has without addressing arguments on the question of delay and laches, submitted that the impugned orders are illegal, therefore the petitioner is entitled to be reinstated with consequential benefits. Having considered all aspects of the matter, I am of the considered opinion that in the facts and circumstances of the case, the points urged by learned counsel for the petitioner need not be gone into in view of the invocation of the jurisdiction of the Court after an inordinate and unexplained delay of 5 years from the date of accrual of cause of action. The claim is clearly hit by delay and laches. Thus, without going into the merits of the case, I find that this is not a fit case for this Court to exercise its powers under Article 226 of the Constitution of India read with Section 103 of the Constitution of Jammu and Kashmir on account of delay and laches.

17. In view of the position noted above, the writ petition is dismissed on ground of delay and laches.

(B.S.Walia)
Judge

JAMMU
26.07.2016
Sanjeev