KAMINI KUMAR DAS CHOUDHURY

v.

STATE OF WEST BENGAL & ORS.

July 24, 1972

[A. N. RAY AND M. H. BEG, JJ.]

Constitution of India, Art. 226—Laches in filing writ petition—Court may refuse discretionary remedy—Disputed questions of fact arising out of petition—Proper remedy is a suit in a Civil Court.

The appliant who was a Sub-Inspector of police in the Enforcement Branch of the Calcutta Police was ordered by the Deputy Commissioner of Police to search a house. He was found by the Assistant Commissioner of Police away from his place of duty. A departmental enquiry was instituted against him and the said Assistant Commissioner of Police was appointed the Enquiry Officer. After the report of the Enquiry Officer the appellant was dismissed by the Deputy Commissioner of Police on 1-8-1951. The appeal preferred by the appellant to the Inspector General of Police was dismissed on 27-10-1951. Thereafter the appellant submitted a memorial to the Government of West Bengal. He filed a petition in the High Court under Article 226 of the Constitution on 9th September 1953. The delay was explained by him by saying that fearing harassment and oppression by the Police he had gone away to the Andaman Islands in November 1952. A single judge of the High Court dismissed the petition on the prelim' . ry grounds namely, (i) that there was inordinate delay in approaching the High Court, and (ii) that the objection as to the jurisdiction of the dismissing authority was not taken in the course of departmental proceedings. The Division Bench dismissed the appeal principally on the ground of delay through it was disposed to hold that during the Departmental enquiry the rules of natural justice had been violated. With certificate appeal was filed in this Court.

HELD: (i) The questions whether there was bias, ill-will *malafides*, or a due opportunity to be heard or to produce evidence, given in the course of departmental proceedings, are so largely questions of fact that it is difficult to decide them merely on conflicting assertions made by affidavits given by the two sides. The mere fact that the Deputy Commissioner's orders were alleged to have been disobeyed did not make him a complainant and a witness. Therefore, quite apart from the ground of delay in filing the Writ Petition, the assertions and counter-as-ertions made on merits were of such a nature that, in accordance with the rule laid down by this Court in *Union of India* v. *T. R. Varma*, the Writ Petition could have been dismissed on the ground that it is not the practice of Courts to decide such dispute questions of fact in proceedings under Art. 226 of the Constitution. [724 B-C]

Union of India v. *T. R. Varma*, [1958] S.C.R. 499 applied.

(ii) The High Court was right in dismissing the appellant's petition on the ground of delay.

The most that the High Court could have done in the present case was to quash the order of dismissal and to leave the authorities free to take proceedings against the appellant. The appellant would then have got another long period of years in front of him to go on contesting the validity of proceedings against him until he had gone past the age of retirement. In such cases, it is imperative, if the petitioner wants to

A invoke the extraordinary remedies available under Art. 226 of the Constitution, that he should some to Court at the earliest reasonably possible opportunity. If there is delay in getting an adjudication, a suit for damages actually sustained by wrongful dismissal may become the more or even the only appropriate means of redress. Every case depends upon its own facts. [725 F-H]

B *Rabindra Nath Bose & Ors.* v. *Union of India & Ors.* [1970] (2) S.C.R. 697 applied.

State of Madhya Pradesh v. *Bhailal & Ors.*, [1964] (6) S.C.R. 261 referred to.

Chandra Bhushan & Anr. v. *Deputy Director of Consolidation Regional U.P. & Ors.*, [1967] (2) S.C.R. 286 distinguished.

C [Dismissing the appeal on the above grounds the Court however observed that in such cases it was undoubtedly just and proper that the enquiry and punishment proceedings should have been entrusted to more unbiased and independent officers.]

CIVIL APPELLATE JURISDICTION : C. A. No. 1162 of 1967.

D Appeal by certificate under Article 133 of the Constitution of India from the judgment and order dated 14th May 1963 of the Calcutta High Court in Appeal from Order No. 44 of 1958.

Govinda Mukhoty, Rathin Das and *G. S. Chatterjee,* for the appellant.

P. K. Chakravarty and *Prodyat Kumar Chakravarty,* for the E respondents.

The Judgment of the Court was delivered by

Beg, J. The appellant was a Sub Inspector of Police serving in the Enforcement Branch of the Calcutta Police on 20th May 1951, when he was ordered by S. Mukherji, Deputy F Commissioner of Police, Enforcement Branch, to search a house at 13/2 Sir Guru Das Road, in Kankurgachi Basti. He alleged that the search concluded at 6-30 a.m., and, thereafter, he had gone to take tea "with the permission and/or knowledge of his immediate superior Sub Inspector S. N. Bose". We fail to understand what the appellant exactly meant when he swore, in G his affidavit, that he had gone to take tea "with the permission and/or knowledge"of his immediate superior officer. He could not reasonably be believed to be uncertain on such a point. The appellant alleged that he was met by the Assistant Commissioner of Police, Ataur Rahman, when he was coming back, after taking tea, to the place of search, but he was still at a distance of about one furlong from the assigned place of duty. H He alleged that the Assistant Commissioner charged the appellant, immediately on accosting him, with dereliction of his duties, with disobedience of the order to remain at the post of his duty,

with carrying out the search perfunctorily, with disloyalty and giving away of information of proposed searchs to offending members of the public so that the purpose of the search, which was said to be detection of spurious ration cards, may be defeated. It was stated that the appellant was immediately suspended and the Assistant Commissioner Ataur Rahman was appointed the Enquiry Officer. The appellant also alleged certain violations of the rules under the Police Regulations in Bengal, mainly by not making the charges or their particulars clear to him and by not affording due opportunity to the appellant to offer his defence or to cross-examine witnesses. Furthermore, the appellant alleged that the proceeding was the result of the bias and ill-will of Deputy Commissioner of Police, S. Mukherji, against him, because the appellant had taken some proceedings against "anti-social elements" who were, according to him, friendly with the Deputy Commissioner of Police. The appellant also assrted that he was harassed by false and frivolous criminal proceedings under the Essential Supplies Act and under Section 124-A I.P.C. in October, 1951, due to this grudge of the Deputy Commissioner against him. The appellant had, however, been duly served with show cause notices at two stages and had produced evidence which the Enquirying Officer considered relevant. Permission to call other evidence, considered irrelevant and to cross-examine some witnesses, who had not been relied upon by the prosecution, was not given. The five prosecution witnesses relied upon by the prosecution were cross-examined by the appellant. He had also examined seven defence witnesses. After the report of the Enquirying Officer against the appellant, he was dismissed from the Police Force by the Deputy Commissioner of Police, S. Mukherji, on 1-8-1951. The appeal preferred by the appellant to the Inspector General of Police was also dismissed on 27-10-1951. Thereafter, the petitioner had submitted a memorial to the Govt. of West Bengal. He also stated that fearing "harassment and oppression" by the Police he went away to the Andaman Islands in November, 1952. He had filed his petition under Article 226 of the Constitution on 9th September, 1953.

The appellant's petition was dismissed on 11-9-1957 by a learned Judge of the Calcutta High Court on two preliminary grounds : firstly, that there was inordinate delay on the part of the appellant in approaching the High Court; and, secondly, that the objection to the jurisdiction of the dismissing authority, the Deputy Commissioner of Police, was not taken, in the course of Departmental proceedings, so that it could not be allowed to be raised before the High Court for the first time. It appears that the main point argued, on merits, before the learned Single

A Judge, was the absence of power in the Deputy Commissioner of Police, who was said to be an authority lower in rank than the appointing authority of the appellant, to dismiss the appellant from service. Although it was held that the appellant was debarred from raising this question, as it was not raised during departmental proceedings, yet, the learned Single Judge thought B it fit to consider and decide it. The learned Judge held that the Deputy Commissioner of Police seemed to be of the same grade and status as the Principal of the Police Training School, Sharda, with the rank of a "Superintendent", and who had appointed the appellant, so that there was no violation of Article 311(1) of the Constitution. And, in any case, the dismissal was C confirmed by the higher authority of the Inspector General. The learned Single Judge had also found no substance in the plea of alleged ill-will and *malafides* on the part of the Deputy Commissioner of Police, S. Mukherji. Furthermore, the learned Judge had found it "difficult to swallow" the appellant's assertions that he had gone away to the Andaman Islands to avoid D prosecution as he was afraid of being arrested under the Preventive Detention Act. Such strange conduct, indicating a possible sense of guilt even if the appellant's assertions could be true, was not found to be natural. Hence, the explanation for delay given by the appellant was rejected by the learned Judge.

On appeal from the decision of the learned Single Judge, a E Division Bench of the Calcutta High Court dismissed it principally on the ground of inordinate delay despite the fact that the Division Bench was disposed to hold that rules of natural justice had been violated in the Departmental Enquiry against the appellant. The Division Bench, however, observed that it appeared "that F the grounds raised against the proper conduct of the Enquiry and refusal of some of the prayers of the appellant made during its pendency were not pressed before the Trial Judge". The Division Bench also rejected the explanation of the delay put forward by the appellant. It held that, although it appeared that a complainant had assumed the role of a judge in departmental proceedings against the appellant, yet, the inordinate delay in approaching the Court was fatal to the success of the appellant. It observed : "If the appellant before us had been able to give a satisfactory explanation as to why he could not move the Court within a few weeks after June 1952, we would have felt disposed to allow the appeal. As noted already, there is no corroboration of the appellant's statement that he had gone away to the Andaman Islands or of the fact that he had fled the country through H fear of prosecution by the respondent No. 3".

The appellant had obtained a certificate of fitness of the case for appeal to this Court under Article 133(1)(c) of the Consti-

tution, because it was contended on behalf of the appellant that, as the application under Article 226 of the Constitution had been made within a period of 3 years from the original order of dismissal, a suit, if filed for a declaration that the dismissal was wrongful, would have been within time. It appears that reliance was placed for this contention on the following observations of Das Gupta, J, in *State of Madhya Pradesh* v. *Bhailal & Ors.*(1), (at page 273-274) :

> "It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil Court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. This Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable".

In *Bhilal's* case (Supra), the question before this Court was whether an amount of money illegally realised as tax under a legally void provision could be ordered to be refunded. This Court held that, if the aggrieved person came to the High Court within the period of limitation prescribed for ordinary suits for challenging an illegal exaction under a void order, the writ could issue. It, however, made it clear that this was not an inflexible rule which could be applied to the exercise of discretionary power under Article 226 of the Constitution in every case. It cautioned

> "At the same time we cannot lose sight of the fact that the special remedy provided in Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legtimately open in such actions. It has been made clear more than once that the power to give relief under Article 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of *mandamus*. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it. Another is the nature of controversy of facts and law that may have to be decided as regards the availability of consequential relief. Thus, where as in these cases, a person comes to the Court for relief under Article 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back the court, if it finds that the assessment

(1) [1964] 6 S.C.R. 261.

A was void, being made under a void provision of law, and the payment was made by mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay down any rule for universal application.

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It may however he stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of *mandamus*. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a *prima facie* triable issue as regards the availability of such relief on the merits on the grounds like limitation the Court should ordinarily refuse to issue the writ of *mandamus* for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil court and to refuse to exercise in his favour the extraordinary remedy under Art. 226 of the Constitution".

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In the case before us, we find that at least the following questions on which both sides made conflicting assertions in affidavits before the Court, were seriously disputed : (1) Was the appellant denied due opportunity to adduce any relevant evidence or to cross-examine witnesses? (2) Did the Deputy Commissioner of Police, who had passed the dismissal order, become a complainant or a necessary witness in the case so that he could not award punishment simply because he had passed the order which the appellant was shown to have disobeyed ? (3) Was there any actual bias on the part of the dismissing authority, or, in other words, was the order of dismissal vitiated by *malafides* ? Perhaps, it was for this reason, as the Division Bench had observed, that the appellant did not press his case on disputed questions of fact before the Single Judge. Although, the appellant raised these points in appeal, yet, the Division Bench was only impressed by the submission that the Deputy Commissioner of Police was in the position of a complainant who could not act as a Judge. But. we find that the actual violation of the order of the Deputy Commissioner was detected by other officers. It is true that the Enquiring Officer had made certain charges against the appellant when he found him returning from somewhere, one furlong removed from the place where, according to orders given, the appellant should have been present then, yet, he had merely collected evidence against the appellant and made a report. It could more properly be said that he and not the Deputy Commissioner of Police was the accusing officer. In such cases it is

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undoubtedly just and proper that the enquiry and punishment proceedings should both be entrusted to other officers who may appear to be more unbiased and independent. Nonetheless, the questions whether there was bias, ill-will, *malafides,* or a due opportunity to be heard or to produce evidence, given in the course of departmental proceedings, are so largely questions of fact that it is difficult to decide them merely on conflicting assertions made by affidavits given by the two sides. The mere fact that the Deputy Commissioner's orders were alleged to have been disobeyed did not make him a complainant and a witness. We, therefore, think that, quite apart from the ground of delay in filing the Writ Petition, the assertions and counter-assertions made on merits were of such a nature that, in accordance with the rule laid down by this Court in *Union of India* v. *T. R. Varma*[1] the Writ Petition could have been dismissed on the ground that it is not the practice of Courts to decide such disputed questions of fact in proceedings under Article 226 of the Constitution. Other proceedings are more appropriate for a just and proper decision of such questions.

We find that the position taken up in affidavits filed on behalf of the State and the Police authorities of West Bengal was that the appellant's case was, according to them, considered fairly and impartially and that there was no grudge or ill-will operating against him. The Calcutta High Court had specifically repelled the allegations of *malafides* and ill-will. If, however, the appellant considers that there is substance in any of his allegations, we think it is best to leave him free to go to an ordinary Civil Court for such relief by way of declaration or damages as may still be open to him. At any rate, we do not think that the discretion of the learned Single Judge and the Division Bench, with regard to a delay which defeated the petitioner's right to a discretionary relief, could be interfered with by us in this case.

Learned Counsel for the appellant had relied upon *Chandra Bhushan & Anr.* v. *Deputy Director of Consolidation (Regional) U.P. & Ors.*[2], where this Court has set aside an order of the Allahabad High Court dismissing a Writ Petition *in limine* by "exalting a rule of practice into a rule of limitation", so that a few days' delay, shown to have been caused by the closing of the office of the Court for Diwali holidays was not condoned by the Allahabad High Court. We do not think that the case cited could apply to the facts of the case before us where the peculiar explanation given by the petitioner-appellant for the delay in filing his Writ Petition for so long had been disbelieved by both the learned Single Judge and the Division Bench on good and reasonable grounds.

(1) [1958] S.C.R. 499.

(2) [1967] 2 S. C. R. 286.

A *Rabindra Nath Bose & Ors.* v. *Union of India & Ors.*(1), was also referred to in the course of arguments, although this case relates to the exercise of the powers of this Court under Article 32 of the Constitution. It was said there by this Court (at page 712) :—

B "But after carefully considering the matter, we are of the view that no relief should be given to petitioners who without any reasonable explanation, approach this Court under Article 32 of the Constitution after inordinate delay. The highest Court in this land has been given Original Jurisdiction to entertain petitions under Article 32 of the Constitution. It could not have been C the intention that this Court would go into stale demands after a lapse of years. It is said that Article 32 is itself a guaranteed right. So it is, but it does not follow from this that it was the intention of the Constitution makers that this Court should discard all principles and grant relief in petitions filed after inordinate D delay".

If this is the position with regard to the petitions under Article 32 of the Constitution, we do not think that the rule that delay defeats the rights of a party to seek redress, by means of prerogative Writ under Article 226 of the Constitution, could be held to be abrogated merely because, if the claim had been E brought in a Civil Court, the period of limitation would not have expired. The question in such cases is always whether relief under Article 226 of the Constitution could more justly and properly be given than by leaving the parties to the ordinary remedy of a suit. A case in which a tax is imposed under a clearly void law is different from one where seriously contested questions of F fact have to be decided before an order of dismissal could be held to be void. In the case before us, the most that the High Court could have done was to quash the order of dismissal and to leave the authorities free to take proceedings afresh against the appellant. The appellant would then have got another long period of years in front of him to go on contesting the validity G of proceedings against him until he had gone past the age of retirement. In such cases, it is imperative, if the petitioner wants to invoke the extraordinary remedies available under Article 226 of the Constitution, that he should come to Court at the earliest reasonably possible opportunity. If there is delay in getting an adjudication, a suit for damages actually sustained by wrongful dismissal may become the more or even the only appropriate H means of redress. Every case depends upon its own facts.

(1) [1970] 2 S.C.R. 697.

We may mention that the Division Bench of Calcutta High Court had, treating the case as one for a *mandamus* to reinstate the appellant, relied upon the statements in *Halsbury's Laws of England*, (Third Edition, Volume 11, page 73 article 133) that "except in a case where the delay is accounted for *mandamus* will not be granted unless supplied for within a reasonable time after the demand and refusal". The Division Bench had also referred to *Farris* on *"Extraordinary Legal Remedies"* (page 228), to hold that not only, on an analogy from the Statute of limitation in civil cases, a reasonable period may be indicated for applications for writs of *mandamus*, but relief may be refused on the ground of acquiescence and presumed abandonment of the right to complain inferred from inordinate delay. It rightly observed that laches is a well established ground for refusal to exercise the discretion to issue a writ. The Division Bench had also referred to public interest or public policy which could be taken into account in cases where a public servant had come to a Court for an order in the nature of *mandamus* for reinstatement. It had held that, in such cases, promptness on the part of the aggrieved servant is essential for invoking the extraordinary jurisdiction of a High Court so that the State is not called upon to pay unnecessarily for the period for which the dismissed servant is not employed by it. Indeed, delay may make the motives of the dismissed servant, who may have some technical ground to urge against the dismissal, suspect. We think that there are good grounds here for a refusal to exercise the discretion to interfere with the impugned order of dismissal.

The result is that we dismiss this appeal. The parties will bear their own costs.

G.C. *Appeal dismissed.*