IN THE COURT OF APPEAL OF THE DEMOCRAIC SOCIALIST REPUBLIC OF SRI LANKA.

In the matter of an application for Revision in terms of Article 138 read together with Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka

M/s. Bibile Kotagama Multi Purpose Cooperative Society,
Hewelwela, Bibile.

Petitioner Petioner

Vs.

1. Uva Palath Samupakara Sewaka Commission Sabhawa,
   No. 63, Bandaranayake Mawatha,
   Badulla.
2. T.W.M. Thilakarathne,
   Mullegedarawatta,Thanayamgama,
   Yalkumbura, Bibile.

Respondent Respondents.

Court of Appeal case no. CA/PHC/APN/186/2013

H.C. Monaragala case no. 0/10/Writ

Before : P.R.Walgama J.
: L.T.B. Dehideniya J.

Counsel : Ranjan Suwandarathne with Wickrama Wijenayake for thePetitioner Petioner.
: M.Jayasinghe SC for the 1st Respondent.

: Bimal Rajapakshe with Amrit Rajapakshe for the 2nd Respondent Respondent.

Argued on : 31.03.2016

Written submissions filed on 2nd and 9th of May 2016

Decided on : 07.12.2016

L.T.B. Dehideniya J.

The 2nd Respondent Respondent (the 2nd Respondent) was an employee of the Petitioner Petitioner Society (the Petitioner). A charge sheet was served on him on the allegation of financial misconduct and at the inquiry he was convicted of all the offences. The inquiring officer recommended to fine him one week's salary, recharge the amount misappropriated and to place him on post of clerk without back wages. The Board of Directors of the Petitioner Society discussed the issue at the Board Meeting held on 09.12.2003 and he was offered one week to pay back the amount due and it was communicated to the 2nd Respondent on 10.12.2003, but has failed or neglected to pay. Thereafter the Board of Directors decided on a meeting held on 23.01.2004 to terminate his services. The decision was communicated to the 2nd Respondent on 03.02.2004 by the letter marked X11. The 2nd Respondent appealed to the 1st Respondent Respondent Commission (the 1sst Respondent) against the decision of the Board of Directors on 29.01.2005. The 1st Respondent, after considering the appeal, issued the order marked X15 ordering the Petitioner to reinstate the 2nd Respondent. The Petitioner not being carried out the order, the 1st Respondent instituted action in the Magistrate Court. In the meantime, the Petitioner made an application to the Provincial

High Court of Uva Province holden at Monaragala. The learned High Court Judge was of the view that the order of the 1st Respondent is *ab initio* void for the reason that the appeal presented was time barred, but he did not give relief to the Petitioner on the basis that the delay in filing the writ application in the High Court was not explained. This appeal is from the said order.

The decision of the Board of Directors of the Petitioner was communicated to the 2nd Respondent on 03.02.2004. If the he is not satisfied with the decision, as an employee, he can appeal to the 1st Respondent. The appellate procedure is governed by the rule 135 of regulations published in the Gazette Extraordinary no. 169/8 dated 01.12.1981. The Minister has approved the regulations prepared by the Commission and published under the section 32 of the Co-operative Employees Commission Act 12 of 1972 as amended by Act 51 of 1992. The section reads;

> *32. (1) Unless otherwise expressly provided, the Commission may make all such regulations as may seem to the Commission to be necessary for carrying out the provisions of this Act or giving effect to the principles thereof, including regulations for all matters for or in respect of which regulations are authorized or required to be made under this Act, and alt matters stated or required by this Act to be prescribed.*
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> *(2) No such regulation shall have effect until it has been approved by the Minister and notification of such approval has been published in the Gazette.*
>
> *(3) Upon the publication in the Gazette of any notification under subsection (2), the regulation to which the notification*

relates shall be as valid and effectual as though it were herein enacted.

As per the Gazette notification, subsections (1) and (2) have been complied with and therefore subsection (3) comes in to operation and the regulations become valid and effectual as it was enacted therein. The regulations published in the Gazette have a statutory flavour.

The rule 135 of the regulations requires that any employee who is dissatisfied with the order, to appeal to the Commission within 60 days from the order. This is an absolute time bar. When the law requires a person to do a thing within a prescribed period and if it has not done within that period, he is precluded from doing it thereafter. The 1st Respondent's contention is that under the Code of Procedure of Cooperative Employees the time period provided for presenting the appeal is 06 months. Under subsection (2) of section 32 of the Act, no such regulation shall have effect until it has been approved by the Minister and notification of such approval has been published in the Gazette. The 1st Respondent has failed to submit that the said Code has been approved by the Minister and published in the Gazette. Especially when the Code has an effect of amending the rule 135, the approval and publication should have been established. Without it, the rule 135 exists.

The order of the 1st Respondent X15 referrers to the appeal dated 29.01.2005. The order made on the appeal presented on 29.01.2005 under rule 135 of the regulations published in the Gazette 169/8. Therefore it is clear that the appeal in question is dated 29.01.2005. The order challenged by the 2nd Respondent in his appeal to the 1st Respondent, was conveyed to him on 03.02.2004. The appeal submitted 11 months after the order. It is clearly out of 60 days provided in the rule 135 and it is out of 06 months period too. The 1st Respondent has no jurisdiction to entertain an appeal presented after the appealable period. The learned

High Court Judge correctly decided that the order of the 1st Respondent is without jurisdiction and is bad in law. The Petitioner did not contest that part of the order.

The current writ application presented to the High Court by the Petitioner after two and half years of X15. Unexplained delay in coming to Court is considered as bar in obtaining relief in discretionary remedies such as prerogative writs. But the delay in coming to Court has to be considered in reference to the circumstances of each case. In reference to revision applications, which is also a discretionary remedy, the Court held in the case of Gnanapandithen and another V. Balanayagam and another [1998] 1 Sri L R 391 the question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. In the case of Biso Menika vs. Cyril de Alwis and Others [1982] 1 Sri L R 368 the issue of delay in coming to Court has been considered and held that;

> *The proposition that the application for Writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chances of his success in a Writ application dwindle and the Court may reject a Writ application on the ground of unexplained delay.*
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> *"Laches is such negligence or omission to assert a right and taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party operate as a bar in a Court of equity" Ferris - Extraordinary Legal Remedies - para 176.*
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> *"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 equal 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 unjust, is founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitation, 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 related to the remedy." Lindsey Petroleum Co., Vs. Hurd (1874) L.R., 5 P.C 221 at 239.

An application for a Writ of Certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed. What is reasonable time and what will constitute undue delay will depend upon the facts of each particular case. However the time lag that can be explained does not spell laches or delay. If the delay can be reasonably explained, the Court will not decline to interfere. The delay which a Court can excuse is one which is caused by the applicant pursuing a legal remedy and not a remedy which is extra-legal. One satisfactory way to explain the delay is for the petitioner to show that he has been seeking relief elsewhere in a manner provided by the Law.

When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay,

unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In Any such event, the explanation of the delay should be considered sympathetically.

"Recent practice clearly indicates that where the proceedings were a nullity an award of Certiorari will not readily be denied" - de Smith - Judicial Review - 4th Ed. page 426.

In this connection Professor Wade in his "Administrative Law" 4th Ed. at page 561 states

"the discretion to withhold remedy against unlawful action may make inroads upon the rule of Law and must therefore be exercised with the greatest care. In any normal case the remedy accompanies the right, but the fact that a person aggrieved is entitled to Certiorari ex debito justitiae does not alter the fact that a Court has power to exercise the discretion against him, as it may in the case of any discretionary remedy."

Unlike in English Law or in our Law there is no statutory time limit within which a petition for the issue of a Writ must be filed. But a rule of practice has grown which insists upon such petition being made without undue delay. When no time limit is specified for seeking such remedy, the Court has ample power to condone delays, where denial of Writ to the petitioner is likely to cause great injustice. The Court may therefore in its discretion entertain the application in spite of the fact that a petitioner comes to Court late, -especially where the Order challenged is a nullity for absolute want of jurisdiction in the authority making the order.

In the case of P. Beatrice Perera Vs. The Commissioner Of National Housing 77 NLR 361 it was held that;

> *Where summons has not been served at all, an ex parte judgment against the defendant is void ab initio and the defendant can challenge its validity at any time when the judgment so obtained is sought to be used against him either in the same proceedings or collaterally, provided always that he has not by subsequent conduct estopped himself by acquiescence, waiver or inaction.*

Delhi High Court in the case of Dinesh Elhence v Delhi Development Authority, Case No: W. P. (C) 2954/2016 (2016 Indlaw DEL 4553) the issue of delay in filing writ applications have been discussed and held that;

> *13. The question of condonation of delay is one of discretion and has to be decided on the basis of the facts of the case at hand, as the same vary from case to case. It will depend upon what the breach of fundamental right and the remedy claimed are and when and how the delay arose. It is not that there is any period of limitation for the courts to exercise their powers under Article 226, nor is it that there can never be a case where the courts cannot interfere in a matter, after the passage of a certain length of time. There may be a case where the demand for justice is so compelling, that the High Court would be inclined to interfere in spite of delay. Ultimately, it would be a matter within the discretion of the Court and such discretion, must be exercised fairly and justly so as to promote justice and not to defeat it. The validity of the party's defence must be tried upon principles substantially equitable. (Vide P.S. Sadasivaswamy v. State of T.N. [(1975) 1 SCC 152 : 1975 SCC (L & S) 22 : AIR 1974 SC 2271 1974 Indlaw SC 110], State of M.P. v. Nandlal Jaiswal [(1986) 4 SCC 566 : AIR 1987 SC 251*

1986 Indlaw SC 256] and Tridip Kumar Dingal v. State of W.B. [(2009) 1 SCC 768 : (2009) 2 SCC (L & S) 119 2008 Indlaw SC 2180])

14. 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, delay 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 a 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. (Vide Durga Prashad v. Chief Controller of Imports and Exports [(1969) 1 SCC 185 : AIR 1970 SC 769 1968 Indlaw SC 352], Collector (LA) v. Katiji [(1987) 2 SCC 107 : 1989 SCC (Tax) 172 : AIR 1987 SC 1353 1987 Indlaw SC 28811], Dehri Rohtas Light Railway Co. Ltd. v. District Board, Bhojpur [(1992) 2 SCC 598 : AIR 1993 SC 802 1992 Indlaw SC 1079], Dayal Singh v. Union of India [(2003) 2 SCC 593 : AIR 2003 SC 1140 2003 Indlaw SC 61] and Shankara Coop. Housing Society Ltd. v. M. Prabhakar [(2011) 5 SCC 607 : (2011) 3 SCC (Civ) 56 : AIR 2011 SC 2161 2011 Indlaw SC 340] .)

In the present case in hand the learned High Court Judge has found that the impugned order of the 1st respondent marked X15 is bad in law. I agree with the learned High Court Judge because the appeal was time

barred. The 1st Respondent shouldn't have entertained the appeal. Therefore the order X15 is void *ab initio*. The learned High Court Judge has not granted the relief only on the ground that the delay in filing the application was explained. As it was mentioned above the Court has the discretion to grant relief in cases where the justice requires doing so. In the present case the 2nd Respondent was convicted for offences of financial misconduct. The petitioner Society is an institute handling public funds in large scale. A person who has been convicted for financial misconduct is not a suitable person to be employed in an institution like the Petitioner. Therefore the Petitioner has a good and reasonable ground to challenge the order X15 even after some time when the 1st Respondent took steps to implement the order.

I act in revision and set aside only the part of dismissal of the application in the order of the learned High Court Judge dated 31.10.2013.

I order to issue a writ in the nature of writ of certiorari against the 1st Respondent quashing the decision of the 1st Respondent dated 13.06.2008 marked X15.

Revision application allowed. Considering the nature of the case, I order no costs. The parties to bear own their costs.

Judge of the Court of Appeal

P.R.Walgama J.

I agree.

Judge of the Court of Appeal