Diksha Rane

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1819 OF 2019

E-LAND APPARELS LTD.
(formerly knonw as Mudra Life Style
Ltd.) having its Western Region Office
at office No.404, 4th floor,
Western Edge 1, Western Express WA
Magathane, Borivali East, Mumbai 400 066
through its authorized signatory
Mr. Dharmesh Sangani ..PETITIONER

VS.

1. STATE OF MAHARASHTRA
having its office at Govt. Pleader
PWD Building, Ground Floor,
Bombay High Court, Mumbai 400 020.

2. COMMISSIONER OF SALES TAX
Maharashtra State, Having his office at
GST Bhavan, Mazgaon, Mumbai – 400 010.

3. DY COMMISSIONER OF STATE TAX
MUM-VAT-E-501, 6th floor,
Refund and Refund Audit Branch,
Mazgaon, Mumbai 400 010. ..RESPONDENTS

Mrs. Nikita Badheka a/w. Mr. Parth Badheka a/w. Ms. Lata Nagal for the petitioner.

Mrs. Jyoti Chavan, AGP for respondent Nos.1 to 3 – State.

CORAM : DIPANKAR DATTA, CJ &
M. S. KARNIK, J.

DATE: OCTOBER 5, 2021

ORDER (PER M.S. KARNIK, J.) :

1. The writ jurisdiction of this Court is invoked under Article 226 of the Constitution of India by the petitioner seeking a mandamus to the respondent No.2 – Commissioner of Sales Tax, Maharashtra State, to grant refund and interest to the tune of Rs.95,42,187/-. The petitioner, *inter alia*, also prays for a declaration that the rejection order of refund for the first quarter of the period 2009-2010 is *non-est* and void as it is not served on the petitioner till date.

2. An objection is raised by learned AGP appearing on behalf of the respondent Nos. 2 and 3 that the Petition suffers from delay and laches. In justification of the stand that the Petition does not suffer from delay and laches, learned counsel for the petitioner submitted that as the order refusing refund was never served on the petitioner, this Petition does not suffer from delay and laches. It is further the submission of learned counsel that the petitioner is a dealer registered under the Maharashtra Value Added Tax Act, 2002 ('the said Act' for short) in the business of

trading and manufacturing of textile fabrics. Their sale was exempted under the MVAT. Learned counsel submits that the materials purchased for the purpose of manufacturing fabrics constituting inputs are taxable, as such, the petitioner's assessment usually resulted in the claim of sizable refunds at each of the financial years.

3. Learned counsel relied upon the chart which is at Exhibit B and in the petition to demonstrate the refund granted to the petitioner over the years. It is submitted that in the MVAT return for the F.Y. 2009-2010 (relevant period for short), following regular practice and in consonance with the circulars issued by the Commissioner, the petitioner claimed consolidated refund for the entire year to the tune of Rs.1268475/-. The Application in Form 501 was filed on September 30, 2011 for part refund. Learned counsel submits that no order on the said application was served on the petitioner. It is the submission that the petitioner was orally informed by the departmental officers that their refund application for the first quarter was rejected. No order was made available or served on them to enable

petitioner to take further actions.

4. Learned counsel submits that so far as the relevant period is concerned, the petitioner has not received any assessment or refund audit notice. In the submission of learned counsel, assuming without admitting, such order was passed ex-parte, the petitioner had a legal right to appeal against such orders and the order/s, if any, ought to have been served. A letter dated October 4, 2015 was addressed by the petitioner to the respondents stating that no cognizance was taken by the department on the refund application filed by the petitioner in 2011. The petitioner then applied on April 20, 2018 under Right to Information Act seeking status of the refund application. The department replied on May 30, 2018 stating that no details were available with them. The petitioner persisted with the remedy under Right to Information Act. Ultimately a reply was received by the petitioner on October 9, 2018 from the office of the respondent No.3 wherein it is mentioned that the application for refund was rejected. It is the petitioner's grievance that the copy of the rejection order was not

provided. The petitioner was therefore left with no other alternative but to approach this Court by way of the present writ petition. Learned counsel urged that the cause of action survives and having regard to the explanation in the petition, the live link with the dispute has not snapped. The petitioner after exhausting all possible remedies approached this Court.

5. Learned AGP for the respondents on the other hand invited our attention to the affidavit-in-reply filed on their behalf and submits that the application for refund was made on September 30, 2011 which came to be rejected for the first quarter April 1, 2009 to June 30, 2009 on September 20, 2012. The right to claim the refund crystalised on September 30, 2011 and hence the claim raised in this writ petition is hopelessly belated and stale, suffering from delay and laches.

6. We have heard learned counsel for the parties, perused the copy of the writ petition, annexures, affidavit-in-reply and the rejoinder filed.

7. It is the contention of the petitioner that for the

relevant period, no notice for assessment or the order rejecting refund is served. The respondents in the affidavit-in-reply stated that respondent No.3 has rejected refund claim on September 20, 2012 for the first quarter by issuing online refund rejection order under Rule 60 read with Section 51 of the said Act which is served on the petitioner by way of pasting as the petitioner was not found at the place of business. The visit report by the Sales Tax Inspector is also placed on record. At this juncture, it is pertinent to mention that the petitioner's predecessors were carrying on the business in the name and style as 'Mudra Lifestyle Ltd.' prior to 2011. The original company was taken over by E-Land group of South Korea and the name of the erstwhile company was changed to 'E Land Apparel Ltd'. The new management is therefore pursuing the matter based on the records available.

8. Learned AGP has correctly placed reliance on Section 18 of the said Act which provides that any registered dealer liable to pay tax under this Act, who transfers by way of sale or otherwise disposes of his business or any part

thereof, or effects or knows of any other change in the ownership of the business, and changes the name of his business, shall, within the prescribed time, inform the prescribed authority accordingly. There is nothing on record to indicate and even learned counsel for the petitioner was not in a position to demonstrate that there is due compliance with the provisions of Section 18 of the said Act. We, therefore, do not find any substance in the contention of the petitioner that as the copy of the refund rejection order is not served the cause of action survives. There is a failure to take steps as per the requirement of Section 18 of the said Act. It is therefore not possible to ignore or brush aside the stand of the respondents that the order has been served by way of pasting as the assessee named in the application was not found at the place of business.

9. We have also perused the copy of the roznama produced by the respondents which records that on August 29, 2012 fresh notice in Form 301 is issued for the assessment of the first quarter of 2009. The report was received that the dealer was not available at the place of

business. The roznama records that as the dealer is not available at the place of business and not responding for the last 2 years, the case is closed for rejection. It is stated that many opportunities were given but the dealer was not available at the place of business and there was no response and hence application was rejected. The roznama dated March 25, 2014 records that the application made by the dealer for the year 2009-2010 is rejected on September 20, 2012 and served on September 26, 2012 by pasting. Hence, assessment/audit is not done in the case.

10. The acknowledgment Form-501 at Exhibit A2 for part refund scheme indicates that the transaction is dated September 30, 2011 and specifically mentions the period of Annexure 'A' from April 1, 2004 to March 31, 2010. In any case the order rejecting part refund is dated September 20, 2012. In this context, it is material to refer to the communication dated October 14, 2015 addressed by the petitioner to the respondents. In the said communication reference is made to the refund application viz. Form 501 dated September 30, 2011 claiming refund for the Financial

Year 2009-2010. The petitioner has mentioned that the company had received one refund rejection order from the office of Deputy Commissioner of Sales Tax for the period of April 1, 2009 to June 30, 2009 amounting to Rs.41,42,109/- vide refund rejection order dated September 20, 2012. It is stated that the company is unable to trace the documents and hence it is not clear as to how the refund application for the particular quarter was processed and rejected. Even this application for considering the claim of refund for the full year i.e. Financial Year 2009-2010 was made on October 14, 2015.

11. Thereafter, the application under Right to Information Act on April 20, 2018 is made. We find that by filing an application under the Right to Information Act, the petitioner's attempt is only to resurrect the cause of action. The right to seek the refund in the instant case crystalised on September 30, 2011 itself, viz. the date of transaction stated in form 501. The response to the RTI application of the respondents on October 9, 2018 that the refund application for the amount of Rs.1,26,98,745/- was rejected

by the department can hardly be a ground for the petitioner to resurrect the cause of action. The communication dated October 9, 2018 is merely a response indicating the status of the petitioner's claim having been rejected. This too in response to the query made under the Right to Information Act. The respondents merely supplied information as regards the decision already made. We may usefully make a reference to the decision of the Hon'ble Supreme Court in the case of **Union of India and others vs. M.K. Sarkar**[1] in support of the view that we have taken. In paragraph 15 and 16, Their Lordships have held thus :-

> "15. 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 cannot 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 direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will

1 (2010) 2 SCC 59

extend the limitation, or erase the delay and laches.

16. 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 `state' 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 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."

Thus the reply dated October 9, 2018 cannot be considered as furnishing a fresh cause of action for reviving a dead issue or a stale claim.

12. The petitioner then takes a stand that as the business was taken over from predecessor entity in 2011 and as the company was in a shifting process, the notices and orders issued by respondents might be misplaced. Further it is their stand that the company is unable to trace the

documents as regards the application for refund. The petitioner woke up from its slumber on October 14, 2015. In our opinion this is not a case of unjust enrichment enuring to the benefit of the respondents. Though the right to claim refund is crystalised way back on September 30, 2011, the petitioner chose not to enforce their rights with diligence and promptitude. This is a case where by passage of time the petitioner has allowed the remedy of claiming refund to be lost. Mere making an application on October 14, 2015 and then trying to obtain information under the Right to Information Act since 2018 onwards will not revive a stale claim. The law is well settled that making of repeated representations does not have the effect of keeping the claim alive. The petitioner has referred to the application dated October 14, 2015 and the application made under Right to Information Act from 2018 onwards to explain the delay in filing the writ petition. However, the explanation, in our opinion, is unsatisfactory. These repeated representations do not give a fresh cause of action to the petitioner and mere making of representation cannot

justify a belated approach. It cannot be said that petitioner was pursuing the statutory remedies in respect of the refund claim. The petitioner was not vigilant of its rights and therefore we do not feel that we should exercise our extraordinary writ jurisdiction in its favour. The petitioner having taken a stand that the notices and orders might have been misplaced by the petitioner, expects the respondents to furnish all the documents and supply materials at such a belated stage. Their Lordships in the case of **Karnataka Power Corporation Ltd. and anr. Vs. K. Thangappan and anr.**[2] held that delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the Constitution. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Of course, the discretion has to be exercised judicially and reasonably. Referring to the decision

2 AIR 2006 SC 1581

in the case of **State of M. P. Vs. Nandlal**[3], Their Lordships observed that the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in exercise of its writ jurisdiction. It was stated that this rule is premised on a number of factors.

13. The present matter can also be considered from the point of view that the application for refund is in the nature of a money claim. Learned counsel for the petitioner relied on the decision of this Court dated March 3, 2015 in the case of **Vichare and Co. Pvt. Ltd. vs. The State of Maharashtra and Ors**.[4] to contend that this Court in the exercise of writ jurisdiction can direct the respondents to process the claim of refund. We are in complete agreement with this proposition and in any case this issue is no more *res integra*. Learned counsel also placed reliance on the decision of the Hon'ble Supreme Court in the case of **State**

3 AIR 1987 SC 251
4 Writ Petition (L) No.297 of 2015

of H.P. and others vs. Gujarat Ambuja Cement Ltd. and another[5] to contend that the rule relating to the existence of an alternative remedy as barring the writ jurisdiction under Article 226 of the Constitution of India is only a rule of self-imposed limitation; it is essentially a rule of policy, convenience and discretion. The decision in **State of H.P. and others** (supra) has no application in the facts of the present case as the issue involved for our consideration is whether delay and laches is a factor to be considered for refusing to exercise our discretionary writ jurisdiction.

14. The right to seek the refund having been crystalised on September 30, 2011 and in any case as the order rejecting refund is passed on September 20, 2012, it was expected that the petitioner approaches this Court as early as possible and without undue delay. The petitioner slept over its rights. In this context, it is necessary to make a profitable reference to the decision of the Hon'ble Supreme Court in the case of **The State of Madhya Pradesh and**

5 AIR 2005 SC 3936

another vs. Bhailal Bhai and others.[6] Their Lordships held 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 legitimately 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. Their Lordships thus held that as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by the extraordinary remedy of mandamus. Their Lordships then considered the following submission made by learned counsel 'that assuming that the remedy of recovery by action in a civil court stood barred on the date these applications were made that would be no reason to refuse relief under Article 226 of the

6 1964 AIR 1006

Constitution' and the same is answered thus :-

> "It is also held that learned counsel is right in his submission that the provisions of the Limitation Act do not as such apply to the granting of relief under Article 226. 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. The 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. The period of limitation prescribed for recovery of money paid by mistake under the Limitation Act is three years from the date when the mistake is known.
>
> (emphasis supplied)

15. In **Bhailal Bhai's case** Their Lordships further held that even if there is no such delay in cases where the Government or the statutory authority 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 writ of mandamus for such

payment. It is held that in both these kinds of cases it will be a 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 Article 226 of the Constitution of India. The dictum in **Bhailal Bhai's case** squarely applies in the present facts. We are therefore of the view that the petition being in the nature of a money claim, it does not appear that the petitioner has exercised due diligence and invoked the writ jurisdiction with utmost promptitude.

16. Not only do we find that a stale claim is sought to be agitated by way of this writ petition but the petitioner also raises disputed questions of fact regarding service of the order rejecting the refund. The delay in moving the writ petition is unreasonable and accordingly the same stands dismissed. No costs.

(M.S.KARNIK, J.) **(CHIEF JUSTICE)**