

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **RA 169/2010 & CM 7391/2010 in FAO(OS) 588/2009**

% **Date of Decision: 07.01.2011**

M/s. Binod Engineering & Mechanical Works Appellant

Through Mr.D.Moitra, Advocate.

Versus

Union of India & Another Respondents

Through Nemo.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR.JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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CM No.7391/2010

This is an application by the applicant/appellant seeking condonation of delay in filing the application for review of order dated 4th February, 2010 dismissing the appeal of the applicant/appellant against the dismissal of his application under Order 9 Rule 13 of the Code of Civil Procedure and Section 5 of the Limitation Act seeking condonation of delay of 1550 days.

The applicant/appellant has contended that the counsel for the applicant/appellant was not well since 15th February, 2010 and was not attending to his office for a long period till middle of March, 2010. The applicant/appellant is based in Kolkata and consequently, could not contact the counsel for more than two weeks and could contact him only when he became well and thereafter the review application was prepared and filed,

Applicant has contended that in the circumstances, the delay of 14 days has been caused which is wholly unintentional. The applicant/appellant has contended that there is every likelihood, of the applicant succeeding in getting the order reviewed. The applicant/appellant has therefore, sought condonation of delay in filing the review application.

We have heard the learned counsel for the parties. The application is supported by the affidavit of Sh. Satish Jhunjhunwala. Considering the averments made in the application that the counsel for the applicant/appellant was not well for a considerable period because of which the applicant/appellant could not contact his counsel and after two weeks when the counsel became alright, the applicant/appellant contacted him and got the review application

prepared, would constitute sufficient cause for condonation of delay in the facts and circumstances and in law.

Therefore, in the facts and circumstances, the delay of 14 days in filing the application for review is condoned and the application is allowed.

RA No.169/2010

This is an application by the applicant/appellant seeking review of order dated 4th February, 2010 under Section 114 read with Order 47 of the Code of Civil Procedure, contending inter-alia, that there is an error apparent in the order dated 4th February, 2010 relying on N.Balakrishnan v. M.Krishnamurthy 1998 INDLAW SC 633; State of Punjab v. Hardyal' AIR 1985 SC 920 and Bhagavathy Devaswom v. Bhargavi Amma, 2008 INDLAW SC 2067.

This is not disputed by the petitioner that the Single Judge had dismissed his application under Order 9 Rule 13 of the Code of Civil Procedure against the order dated 15th March, 2004 and had also dismissed the application under Section 5 of the Limitation Act seeking condonation of delay of 1550 days in filing the application under Order 9 Rule 13 of the Code of Civil Procedure.

Relevant facts are that an award dated 25th March, 1998 was given. The award was filed for making a rule of the court where objections were filed by the applicant/appellant. The objections were listed for hearing on 15th October, 2003 when the matter was adjourned to 13th November, 2003. Though, on 15th October, 2003, the matter was adjourned in the presence of the counsel for the applicant/appellant, however, no one appeared on 13th November, 2003 and thereafter on 21st January, 2004. No one appeared even thereafter on 15th March, 2004 leading to dismissal of the objections. Learned Single Judge had noted that even prior to 15th October, 2003 no one had been appearing on behalf of the applicant/appellant, and therefore, objections were dismissed for non-prosecution and award was made rule of the court on 15th March, 2004.

After 15th March, 2004 dismissing the objections and making the award rule of the Court, the application for setting aside the said order was filed in 2008 on the ground that the business of the applicant/appellant's firm had become non-functional since 1998 due to differences between the partners, the office of the applicant/appellant's firm virtually remained closed down and there was no person to take any decision or any other steps with respect to the affairs of the applicant/appellant. The plea was also raised that one of the partners of the applicant/appellant's firm was ill from 2001 till

the end of 2006 and the applicant/appellant came to know about the dismissal of the objections and award being made rule of the court in 2008 whereafter the application for setting aside the order dated 15th March, 2004 and seeking condonation of delay of 1550 days was filed.

The learned Single Judge and the Division Bench while dismissing the application for condonation of delay and the application under Order 9 Rule 13 of the Code of Civil Procedure have noted that the plea that the applicant/appellant that he came to know about the dismissal of the objections in 2008, is incorrect inasmuch as on 3rd June, 2006 a letter was written by the respondents to the applicant/appellant about the dismissal of the objections. After the award was made rule of the court execution was filed where a counsel had appeared on behalf of the applicant/appellant on 12th January, 2007; 6th February, 2007 and 17th April, 2007 before execution was transferred to Calcutta. The plea that the office of the applicant/appellant's firm was non-functional was repelled noticing that the notice of execution was served at the address of the applicant/appellant's firm. The plea that one of the partners was ill was also disbelieved as he had been attending the meetings of the Board of Directors and the medical records of that partner did not reflect any such maladies so as to incapacitate him from doing anything.

The learned Single Judge and the Division Bench while dismissing the application for setting aside the order dated 15th March, 2004 had also noted that the negligence of the other partners has not been explained. No reason was explained as to why no steps were taken from June, 2006 till the end of 2008 for filing the application for setting aside the order dated 15th March, 2004 dismissing the objections of the applicant/appellant and making the award rule of the court.

The Division Bench has also noted 'State of Punjab v. Hardyal' AIR 1985 SC 920 and 'Katari Suryanarayana v. Koppiseti Subba Rao' (2009) 11 SCC 183 to conclude there was no sufficient reason for setting aside the order dated 15th March, 2004, nor was there sufficient reason for condoning the delay of 1550 days. The judgments relied on by the applicant are distinguishable. In State of Punjab Vs Hardyal (supra) the Apex Court had rather held that the power to extend time for making the award rule of the Court can be exercised even by appellate Court. In the case relied on by the applicant the parties had been taking part willingly in the Arbitration proceedings after the expiry of time limit and the Supreme Court had found it to be fit for extension of time. In N Balakrishnan (supra) the Supreme Court had held that acceptability of explanation for the delay is the sole criterion and length of delay is not that relevant. This Court has not accepted the explanation for delay by a detailed order and there are no grounds to

review the order passed by this Court. In *Perumon Bhagvathy Devaswom* the respondent had died during the pendency of the appeal and the death had not been intimated to the appellant either by the counsel for the respondent or by legal heirs and that the appellant was unaware of death of respondent was not disbelieved by the Court and in the circumstances delay in filing the application for substitution was condoned. Apparently all the cases relied on by the applicant does not entitle him for review of order passed by this Court declining to condone the delay of 1550 days.

The learned counsel for the applicant/appellant in the garb of above noted review application wants to re-argue the pleas and contentions raised by the applicant/appellant, which were dealt with by this Court in the order dated 4th February, 2010 dismissing the appeal of the applicant/appellant.

In *Ajit Kumar Ratha v. State of Orissa*, Manu/SCC/0705/99, it was held by the Supreme Court that the power to review is not an absolute power and it is circumscribed by the restriction indicated under Order 47 of the Code of Civil Procedure. Such power can be exercised on the application of a person, on the discovery of new or important matter or the evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him

at the time when the order was passed. The power of review can also be exercised on account of some mistakes or errors apparent on the face of the record or for any other sufficient reason. The learned counsel for the applicant/appellant has relied on the Judgments of the Supreme Court which had been considered by this Court while dismissing the appeal by order dated 4th February, 2010.

In Manu/SCC/0327/2000/ Lily Thomas etc. v. Union of India, it was held that in exercise of power of review the court may correct the mistake but not to substitute the view. The mere possibility of two views on the subject is not a ground for review. In any case in the facts and circumstances, even two views are not possible as the applicant/appellant has failed to make out a sufficient cause for setting aside the order dated 15th March, 2004 and for condonation of delay of 1550 days. The applicant/appellant has failed to establish that there is an error or mistake apparent on the face of the record or there is such other material available with the applicant/appellant which if not taken into consideration would cause miscarriage of justice.

The attempt of the applicant/appellant in the review petition is only to re-agitate the issues which have already been decided by order dated 4th February, 2010 whose review is sought by the applicant/appellant. No error much less and error apparent on the face

of the record has been pointed out by the applicant/appellant. It is also no more res-integra that a review cannot be sought merely for fresh hearing or argument or correction or even erroneous view taken earlier. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying court to exercise its power of review under Order 47 of the Code of Civil Procedure. In exercise of jurisdiction under Order 47, it is not permissible for an alleged erroneous decision to be re-heard and corrected. A review petition, it must be remembered has a limited purpose and thus cannot be allowed to be an appeal in disguise.

In the circumstances, there is no apparent error in the order dated 4th February, 2010 dismissing the application for setting aside the order dated 15th March, 2004 dismissing the objections of the applicant/appellant and making the award dated 25th March, 1998 as a rule of court and also declining to condone the delay of 1550 of days. The application for review is, therefore, without any merit and it is therefore, dismissed. The parties are however, left to bear their own costs.

ANIL KUMAR, J.

January 07, 2011.

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RAJIV SAHAI ENDLAW. J.