

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7361 OF 2015

Ark Elevators / New Ark Electric & Mech. Works ... Petitioner

Vs.

Dr. A. H. Bandivdekar and others ... Respondents

Mr. Kogi Sharma a/w. Mr. T. Pandya i/b. M/s. Jhangiani, Narula & Associates
for Petitioner.

CORAM : R. G. KETKAR, J.

DATE : 29TH JULY, 2015

P.C. :

Heard Mr. Sharma, learned Counsel for petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as defendant No.3, has challenged the judgment and order dated 04.03.2015 passed by the learned Judge, City Civil Court, Mumbai in Notice of Motion No.3359 of 2014 in Small Cause Suit No.7397 of 1997. By that order, the learned trial Judge dismissed the Motion taken out by defendant No.3 for setting aside the order dated 23.05.2010 and condoning the delay of 203 months (6140 days) in filing the written statement.

3. In support of this Petition, Mr. Sharma strenuously contended that for the reasons set out in the affidavit in support of motion, the learned trial Judge ought to have condoned the delay, more so when the draft written statement was already finalized. He further submitted that in fact defendant No.3 has lodged written statement along with the Notice of Motion. He submitted that while considering the Motion for condonation of delay, the Court must take liberal and justice-oriented approach. In support of this proposition, he relied upon the decision of the Apex Court in the case of *Collector, Land Acquisition Vs. Katiji*, (1987) 2 SCC 107 and in particular principles set out in paragraph 3 of that decision.

4. I have considered the submissions advanced by Mr. Sharma. I have also perused the material on record. It is not in dispute that the defendant No.3 has taken out Motion for condoning the delay of 203 months (6140 days) in filing the written statement, which comes to nearly 17 years. Defendant No.3 has given explanation in paragraphs 2 and 3 as under:

“2) I say that I have been served with a Writ of Summons in the abovementioned matter in or about the month of 20th September, 1997. I say that after the service of Writ of Summons, I have kept the same in my files and did not inform my Advocate about the same. I say that in the month of December, 2012, I had gone through the file containing the entire papers and proceedings and at that time I came across the Writ of Summons lying in my files. I say that I immediately contacted my advocate and informed him about the service of Writ of Summons in the matter. I say that my Advocate instructed me that Written Statement is required to be filed and I am required to take out an application for seeking condonation of delay caused in filing my Written Statement. I say that being unaware of importance and gravity of service of Writ of Summons, through oversight I kept the same in files and I had not informed about the same to my Advocate and as such I could not file my Written Statement within stipulated time and the delay of about 6140 days is caused in filing my Written Statement.

3) I say that I immediately prepared my draft Written Statement. However, there were certain documents which were needed to be attached. Therefore, though my draft Written Statement was ready, I could not finalise the same and file before this Hon'ble Court.”

5. In paragraph 5, it is contended that if written statement of defendant No.3 is taken on record, no harm, loss or prejudice will be caused to the plaintiffs and instead irreparable loss will be caused to the defendant No.3, if the written statement is not taken on record. The delay caused in filing the written statement is neither deliberate nor intentional but on account of bonafide mistake on his part and due to unavoidable circumstances as set out earlier.

6. Perusal of paragraph 2 clearly shows that Writ of Summons was

served on defendant No.3 on 20.09.1997. There is no explanation as to what steps defendant No.3 had taken between September 1997 and December 2012. The Motion is taken out on 16.08.2014. Again there is no explanation about what steps were taken between December 2012 and August 2014. In the entire affidavit in support, there is no explanation for these two periods. In the light of this, one has to consider whether the defendant No.3 has made out a case for condoning the delay of almost 17 years. In the case of *Brijesh Kumar Vs. State of Haryana*, (2014) 11 SCC 351, the Apex Court was considering the case for condoning the delay of more than 10 years. The Apex Court has observed that while exercising discretion by the Court, condition precedent, namely sufficient cause for delay must be satisfactorily and convincingly explained. Inordinate delay caused by inaction or negligence lacking bonafides would dis-entitle claimant from protection under Section 5 of the Limitation Act, 1963. In paragraph 13, the Apex Court reproduced paragraph 18 of the decision in the case of *Jagdish Lal Vs. State of Haryana*, (1997) 6 SCC 538, which is as under:

“18. ... Suffice it to state that the appellants kept sleeping over their rights for long and elected to wake up when they had the impetus from *Virpal Chauhan* (1995) 6 SCC 684 and *Ajit Singh* (1996) 2 SCC 715 ratios. ... Therefore, desperate attempts of the appellants to redo the seniority held by them in various cadres ... are not amenable to judicial review at this belated stage. The High Court, therefore, has rightly dismissed the writ petition on the ground of delay as well.”

7. In my opinion, paragraph 18 of **Jagdish Lal's case** (*supra*) applies on all fours to the facts of the present case. It has to be held that in the absence of any explanation for the two periods mentioned hereinabove, the defendant No.3 kept sleeping over its right for long and therefore, the delay cannot be condoned. The learned trial Judge while dismissing the Motion has observed in paragraph 7 that defendant No.3 has adopted casual approach and that the explanation in the affidavit in support as also in rejoinder affidavit is not acceptable for condoning the delay of 203 months.

Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Minal Parab