

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.10.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P.No.26622 of 2017

Edelweiss Asset Reconstruction Company Limited
Registered Office at Edelweiss House, 15th Floor
Off C.S.T. Road, Kalina, Mumbai 400 098
Acting in its capacity as Trustee of
EARC Trust - SC 37 .. Petitioner

Vs.

1.The Presiding Officer
Debts Recovery Tribunal - III
Chennai 600 002

2.Titanium Tantalum Products Limited
86/1, Vengaivasal Main Road
Gowrivakkam
Chennai 600 073

3.T.Jeyanath

4.Dr.R.Thangappan

5.Dr.T.Jeyamohan

.. Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorari, to call for the records and quash the order dated 27.07.2017 passed by the Hon'ble Debts Recovery Tribunal - III, Chennai i.e. Respondent No.1 in M.A. No.66/2017 in O.A. No.127/2014 on the file of the Respondent No.1 and also restore OA No.127/2014 on the file of the Hon'ble Debts Recovery Tribunal - III, Chennai i.e Respondent and issue such further or other orders or directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

For Petitioner : Ms.S.Indumathi Ravi

For Respondents : Mr.A.Alluri Lakshminarayanan
for Mr.Rajasekar - R2 and R3

ORDER
(made by S.MANIKUMAR, J.)

Earlier suit was decreed ex-parte on 21.08.2014. Edelweiss Asset Reconstruction Company Limited, Mumbai, has filed O.A. No.127/2014 on the file of Debts Recovery Tribunal - III, Chennai, for recovery of Rs.48,98,60,031/- together with interest at the rate of 9% per annum compounded monthly, from defendants 1 to 4 therein. Recovery Certificate dated 06.01.2015 was issued for Rs.51,65,54,048/-. Subsequently M.A. No.159/2014 has been filed to set aside ex-parte order, with a delay. Upon condonation, ex-parte order as against the defendants has been set aside. Thereafter, OA was restored.

2. Material on record discloses that loan account has been assigned to Export Import Bank of India, Anna Salai. Hence Substitution Petition No.39/2015 has been filed to substitute Export Import Bank of India, in the place of Edelweiss Asset Reconstruction Company Limited, Mumbai, as applicant in DRC Proceedings No.4/2015, pending on the file of the Recovery Officer in the Original Application No.127/2014 and subsequently in the recovery certificate. Original Application was posted to 08.11.2016 to file an application to implead the Legal representatives of Respondent No.3 and to report compliance.

3. On 08.11.2016, as there was no representation on behalf of the applicant, OA came to be dismissed. For restoration, M.A. No.66/2017 in O.A. No.127/2014, has been filed to condone the delay of 75 days in filing the petition, to restore O.A. No.127/2014, which was dismissed on 08.11.2016.

4. When M.A. No.66/2017 in O.A. No.127/2014 came up for hearing on 27.07.2017, it appears that, both the learned counsel appearing for the parties, made a statement that O.A. No.127/2014 was dismissed for default on 28.11.2016. However, upon perusal of the records, the Tribunal, noticed that there was no such order on 28.11.2016, but the actual order of dismissal was made on 08.11.2016. By observing that time of the Tribunal was wasted and representation had been made even without knowing the date of the actual dismissal of Original Application, Debts Recovery Tribunal - III, Chennai, vide

proceedings dated 27.07.2017, dismissed M.A. No.66/2017 in O.A. No.127/2014. The Said order is impugned in the instant writ petition, on the following grounds:

i) Tribunal erred in passing the order on the ground that the counsel made a representation that the default order was passed on 28.11.2016, without looking into the petition and affidavit, which clearly stated that the order of dismissal was on 08.11.2016;

ii) Tribunal failed to take into consideration the genuine reason in explaining the delay in filing the application to restore the original application and was hyper technical in dismissing the delay condonation application on the ground that the petitioner had wasted the time of the Tribunal without even knowing the date of the default order;

iii) Tribunal completely ignored the fact that the Original Application is for recovery of a huge sum of Rs.48.98 Crores and it has been assigned to the petitioner for recovery. In such circumstances, the impugned order of the Tribunal in dismissing the application to condone the delay of 75 days in filing the petition to restore the OA, which was dismissed for default on 08.11.2016, is erroneous.

5. Heard the learned counsel for the parties and perused the materials available on record.

6. Admittedly, O.A. No.127/2014 has been dismissed on 08.11.2016, but mistakenly, representation seemed to have been made that OA has been dismissed on 28.11.2016. Perusal of the supporting affidavit to M.A. No.66/2017 shows that, at more than one place, averments have been made that OA has been posted on 08.11.2016. When there was no representation on behalf of the applicant therein, OA has been dismissed for default. Even taking it for granted that there was an erroneous representation by the learned counsel appearing for both parties, with reference to the date of dismissal of OA, the Tribunal, ought to have considered the averments made in the supporting affidavit, wherein at paragraphs 5 to 7 and at the end of the supporting affidavit, petitioner has mentioned the date of dismissal as 08.11.2016, and also the Tribunal ought to have considered as to whether sufficient cause was shown by the applicant therein and passed suitable orders, in the condone delay petition.

7. From the reading of the impugned order, it could be deduced that the Debts Recovery Tribunal - III, Chennai has failed to advert to the reasons assigned, instead, appeared to

have passed the impugned order, in a fit of anger, by observing that the time of the Tribunal has been wasted by the parties and representation has been made without knowing the date of dismissal of OA No.127/2014. When erroneous representation has been made by the learned counsel appearing for both the parties, there is absolutely no reason as to why cost of 5,000/- rupees has to be imposed on Export Import Bank of India Limited, the applicant therein/writ petitioner. Further, the Tribunal has failed to consider that earlier Edelweiss Asset Reconstruction Company Limited, Mumbai, has instituted recovery proceedings for Rs.48,98,60,031/- from the defendants and by dismissing M.A. No.66/2017 filed to condone the delay of 75 days in filing the petition to restore OA, passed orders, is nothing but miscarriage of justice. The Tribunal ought to have considered the implication of dismissing the delay petition filed to condone the delay of just 75 days in seeking restoration of OA, when huge public money is involved.

8. It is a trite law that for the mistake committed, party should not suffer. Reference can be made to few decisions.

(a) In Rafiq & Another Vs. Munshilal & Another, reported in 1981 AIR SC 1400, the counsel for the appellant did not appear, the appeal was disposed of. When the appellant was aware of the fact that his appeal had been disposed of, in the absence of his advocate, he moved an application to the High Court, to recall the order, dismissing the appeal and prayed to permit him to participate in the hearing. The said application was rejected by the High Court. On further appeal, the Hon'ble Supreme Court, at para No.3, held as follows:

"The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent

when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs.200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A.K.Sanghi."

(b) In *Goswami Krishna Murarilal Sharma v. Dhan Prakash*, reported in (1981) 4 SCC 574, the appellant's counsel withdrew from the case, stating that he had no instructions from his client. Granting permission to withdraw, the Hon'ble High Court, dismissed the appeal. The High Court declined to restore the appeal. On the above facts, at para '7', the Hon'ble Apex Court, held as follows

"Now, the appellant had engaged his advocate who withdrew, the reasons for withdrawal being known only to the learned Advocate and not ascertainable from the record. It is difficult to appreciate how the Court straight away proceeded to dismiss the appeal on the ground that the appellant in person is not present. It is all the more disquieting how the High Court declined to grant the application for restoration of appeal and to

hear it on merits. Without dilating upon this point, relying on the decision of this Court in Rafiq v. Munshilal [cited supra], we think that the appellant's appeal which was admitted by the High Court should have been heard on merits after giving an opportunity to engage another advocate."

Ultimately, the Hon'ble Apex Court, set aside the order of the High Court, directed restoration of the appeal and hear the appeal on merits.

(c)(i). In Smt.Lachi Tewari & Others Vs. Director of Land Records and Others, reported in AIR 1984 SC 41, the appellant engaged three Advocates. Rule nisi was issued and an interim order in favour of the appellant was granted. When the matter came up for first hearing, after the rule nisi was issued, there was no representation on behalf of the appellant. By observing that there was none to press the application, a Hon'ble Division Bench, discharged the rule, and vacated the interim order. Within 10 days, an application was moved to recall the order, on the grounds that when the case was posted on the reopening day, one of the learned counsel could not return on account of irregularity of Air services, and that the other two counsel were engaged in other courts. High Court did not accept this reason.

(ii). Testing the correctness of the order and following the judgments in Rafiq & Another Vs. Munshilal & Another, reported in 1981 AIR SC 1400 and Goswami Krishna Murarilal Sharma v. Dhan Prakash, reported in (1981) 4 SCC 574, the Hon'ble Apex Court, set aside the orders of the High Court, restored the matter, and revived, the interim order.

(d) In Tahil Ram Issardas Sadarangani Vs. Ramchand Issardas Sadarangani, reported in AIR 1993 SC 1182, the counsel withdrew his appearance. Client was not aware of the hearing date. There was nothing on record to show that the petitioner therein, had the notice of hearing. He was not present. The petition was dismissed for default. Plea for restoration was rejected. On appeal, the Hon'ble Supreme Court, set aside the orders of the High Court.

(e) In Sushila Narahari & Others Vs. Nand Kumari, reported in 1996 (5) SCC 529, the Advocate engaged has derelicted in his duty to inform his client by registered post, if there was any non-cooperation on behalf of the appellants therein. When the suit came up for trial, he had withdrawn his vakalatnama, without notice to his clients/appellants. The trial court set the appellants exparte and decreed the suit. Application filed to condone was dismissed. On appeal, the Hon'ble Supreme Court, by observing that the appellant is justified, condoned the delay. Thus, in the above reported case, it could be inferred that for the fault of the lawyer, the party was not made to

suffer.

(f) In *K.Balakrishnan v. The Special Tahsildar (L.A.)*, North Neighbourhood Project, Madura reported in 1996 (2) MLJ 236, while considering sufficient cause, and the prejudice caused, due to the fault of the counsel, at paragraph 14, this court held thus:

"14. Even if the principle that because of the counsel's mistake the parties should not suffer, the mistake of the counsel should be a bona fide one. The mistake cannot be a wanton or wilful. In such cases, the court cannot come for the rescue of both the counsel as well as the litigant. Hence, I am of the opinion that the delay has not been properly explained and the explanation given by the petitioner will not amount to a sufficient cause as per Section 5 of the Limitation Act. I am fortified with the judgment of the Supreme Court reported in *G. Ramegowda v. Special Land Acquisition Officer, Bangalore*, in which it has been held as follows:

The contours of the area of discretion of the courts in the matter of condonation of delays in filing appeals are set out in a number of pronouncements of this Court. See *Ramlal v. Reva Coalfield Limited*, *Shakuntala Devi v. Kuntal Kumari*, *Concord of India Insurance Co. Limited v. Nirmala Devi*, *Mata Din v. A. Narayanan*, *Collector, Land Acquisition, v. Katiji*. There is, it is true, no general principle saving the party from all mistakes of its counsel. If there is negligence, deliberate or gross inaction or lack of bona fides on the part of the party or its counsel there is no reason why the opposite side should be exposed to a time-barred appeal. Each case will have to be considered on the particularities of its own special facts. However, the expression 'sufficient cause' in Section 5 must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of the delay. In *Katiji's* case, this Court said:

When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for

the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

(g) A Hon'ble Division of this court in *Avvai Home v. Arulmighu Arunachaleswarar Devasthanam*, Thiruvannamalai reported in 1999 (1) MLJ 355, while considering a sufficient cause beyond the control of the party invoking the aid of Limitation Act, at paragraph Nos.16, 18 and 19 held thus:

16. In the instant case, where the delay was not deliberate, but on entrustment to the clerk to file the vakalat, with a bona fide belief that he might have filed, the counsel did not follow the case, : not doing it, the lapse should not affect the party who did his part of the work bona fide believing his counsel. In such a situation, where the lapse was not deliberate or does not smack of mala fides or not intended to adopt any dilatory strategy, it would be a just case to condone the delay, but without making the effort and time of the other side a waste. In other words, an adequate cost would meet the ends of justice to compensate the party for his loss.

18. Normally, sufficient cause must be a cause which is beyond control of the party invoking the aid of the section. For somebody else's negligence or fault, the party or the substantial justice should not be allowed to suffer; Where neither negligence nor want of bonafide is imputable to the party for the delay in filing, it would constitute sufficient cause. Where the party did everything at his command, but the lapse is on the part of the counsel, it affords a ground for condonation. But a slip due to accidental mistake or oversight by a pleader or on the ground of illness may be excused. These are all excusable oversight of a party's advocate, which at times require a liberal approach from the point of the party concerned, where there was no negligence on his part. Not following up the case after engaging a counsel, even assuming that it can come within the ambit of honest mistake, even such mistake is entitled for excuse and comes within the meaning of 'sufficient cause' for excusing the delay.

19. Keeping the nature of the order, the

consequences and the conduct of the party and non-mentioning of the disposal in the suit register, all put together, it indicates a bona fide inaction imputable to the counsel. Therefore, we disagree with the reasoning of the learned trial Judge and we are of the opinion that the explanation constitutes sufficient cause to condone the delay. But for the mistake or inaction on the part of the counsel, the respondent should not be made to suffer for the fault of others.

(h) In *G.Krishnamoorthy v. Arulmighu Sri Pataleeswarar Devasthanam*, rep. By its Executive Officer, Thirupapuliyur, Cuddalore reported in 2010 (1) MWC 837 (Civil), a suit was decreed ex parte, for non-prosecution and non-filing the written statement. Execution proceedings were also launched. An application to condone the delay in setting aside the ex parte decree, was filed under Section 5 of the Limitation Act, on the ground that the Advocate did not inform him properly and that there was also no communication from the lawyer. Accepting the reasons stated and following *Rafiq Munshilal's* case (cited supra), a learned Single Judge of this Court has condoned the delay, on payment of costs.

9. Time and again, this court as well as the Hon'ble Supreme Court, have issued guidelines as to how petitions filed for condonation of delay, have to be dealt with.

10. In the light of the above discussions and decisions, order made in M.A. No.66/2017 in O.A. No.127/2014 dated 27.07.2017 on the file of DRT-III, Chennai is set aside.

11. Considering the time consumed, we are not inclined to remit the matter to the Tribunal to consider the delay excuse petition, which has been dismissed, even without considering the reasons assigned therefor. Having regard to the fact that huge public money is involved and in the light of the decisions extracted supra, and satisfied with the reasons assigned in the supporting affidavit for condonation, delay is condoned. Tribunal is directed to take up the restoration petition on file and pass consequential orders.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

asr

To

1.The Presiding officer
Debts Recovery Tribunal III
Chennai-2

+1 cc to M/s.S.Rajasekar Advocate sr76547
+1 cc to M/s.S.indumathiravi Advocate sr 76286

W.P.No.26622 of 2017

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