

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.808 OF 2017**

Shivaji Balkrushna Shinde

.. Petitioner.

Vs.

Badlapur High School and Ors.

.. Respondents

Mr. Chetan Mali for the Petitioner.

Mr. N.V. Bandiwadekar i/b Mandar G. Bagkar for respondent nos.1 and 2.

Mr.J.A. Madane AGP for respondent no.3.

**CORAM : A.K. MENON , J.
DATED : 4th JANUARY, 2018**

P.C. :

1. Heard. At the outset Mr. Bandiwadekar appearing for respondent no. 1 and 2 contended that the relief claimed by the petitioner cannot be granted since an order of reinstatement cannot be passed in this petition by a Single Judge and if such relief is sought, the petitioner will have to move the Division Bench. Mr.Mali, learned counsel for the petitioner states that he has instructions that the Petitioner is not pressing for relief of reinstatement. In view of this statement, I have proceeded to hear this petition. At this stage both counsel agreed that the petition could be heard finally.

2. By consent of the parties taken up for final hearing. Mr Bandiwadekar for the respondent waives service of notice of final disposal.

3. By this writ petition the petitioner challenges an order dated 21st October 2016 passed by the Presiding Officer, Additional School Tribunal, Navi Mumbai by which the application for condonation of delay in filing an application was rejected.

4. The brief facts of the case are as under : On 6th November, 1995 the petitioner was appointed by the respondent – school to the post of Peon. Respondent No.1 is fully aided high school administered by respondent no.2 – society. The petitioner was a confirmed employee of the school and worked with the school for more than 20 years. It is his case that on 27th June, 2014 he left school early at about 3.30 pm after seeking permission from Head of Peons since he was suffering from extreme pain in his legs. He was treated at the Government Hospital. On 1st July, 2014 the petitioner contends that he submitted an application dated 30th June, 2014 to the school which he contends was submitted to the Supervisor of the school seeking leave from 26th June, 2014 to 6th July, 2014. According to the petitioner till 6th July, 2014 he was taking treated in the Government hospital but since he got no relief he a contacted doctor in a private hospital and he was admitted in that hospital from 6th July, to 8th July,

2014. The copies of the documents are annexed to the petition which will be dealt with at the appropriate time.

5. It is petitioner's case that on 10th July, 2014 the petitioner's wife went to the school (since the petitioner being advised bed rest) along with the application and photocopies of the relevant documents seeking leave till 17th July, 2014 but the same was not accepted. On 30th July, 2014 he personally tried to submit the leave application for the period from 26th June, 2014 to 29th July, 2014. Along with the application, he submitted a copy of a medical certificate but the same was not accepted since the school insisted on the original medical certificate. The petitioner was allowed to join back on the duty and having worked till 6th August, 2014, from 7th August, 2014 he was not allowed to sign the muster for failure to submit the original medical documents.

6. According to the petitioner he had already informed the school that he was ready to produce the original documents but asked for the originals to be given back to him and photocopies to be retained on the record but the school refused. The petitioner was afraid that the original certificates may be destroyed by the school once given hence he contends that he sent copies of the medical certificate by post which was received by respondent no.1 on 26th August, 2014.

7. Since he was not allowed to join duty, he wrote to respondent no.3 – Education Officer requesting for intervention and on 8th January, 2015 after hearing all parties respondent no.3 directed respondent no.1 to allow the petitioner to report back on duty. The school meanwhile treated his absence as leave without pay and therefore there was no question of them stopping the petitioner from joining the duties. Pursuant to the order of 8th January, 2015 the Petitioner once again submitted the leave application along with the photocopies of the medical records but the respondent demanded the original medical records.

8. On 20th April, 2015 the petitioner he caused a demand notice to be sent seeking to join back, but to no avail. On 10th June, 2015 he sent a second notice through his lawyer. A reply was apparently received from the school. In the meantime he received letter dated 6th June, 2015 informing that an inquiry has been instituted and he shall submit name of his representative. According to the petitioner he has not been suspended from the service yet the respondent had not allowed him to join the duties. According to the petitioner no charge-sheet was given to him. He filed an appeal before the School Tribunal on 27th August, 2015 contending that the action of the respondents in preventing him from joining the duties amounted to the termination. Since there was delay in filing the appeal, an application seeking condonation of delay was filed with written submissions.

9. In the meantime during pendency of Miscellaneous Application, the petitioner placed the original medical records before the Tribunal. The application seeking condonation of delay in approaching the Tribunal was dismissed by the order dated 21st October, 2016 on the ground that the petitioner approached the Tribunal with unclean hands. According to the petitioner after the impugned order was passed, he received a letter from the school dated 24th November, 2016 directing him to report back to the duty with effect from 1st December, 2016 on condition that he will have to furnish an undertaking which would amount to admission of alleged misconduct. The conditions required the petitioner to seek apology on misconduct and breach of service rules and undertaking that he would not repeat such misconduct again and that he shall not claim salary for the period beginning from June 2014 till he joins and lastly, an undertaking that the petitioner wasted time, money and energy of the school in filing an appeal before the Tribunal and agreeing to pay damages in future for such conduct.

10. The petitioner reported on 1st December, 2016 but requested for time to send reply dealing with the conditions set out in letter dated 1st December, 2016 but he was not allowed to join back and a letter seeking time was not accepted. According to the petitioner it was unfair of the respondents to demand such an undertaking. Thereafter no further

communication has been received and no suspension order has been received either. Mr. Mali, the learned Counsel for the petitioner submitted that his client is the only bread winner in the family. He has not been paid for last two years and it was due to financial difficulties that he could not approach the Tribunal in time. He had approached various Advocates who did not take up his matter on account of his inability to pay the fees. The writ petition came to be filed only after delay of 78 days and he was hopeful of joining back. In school he sits outside the office premises but he was not given any work and not allowed to sign muster. The petitioner therefore seeks a writ of mandamus directing the respondent for reinstatement with back wages and continuity of services.

11. Mr.Mali, learned counsel appearing on behalf of the petitioner contended that in the case of *Jahed Naziruddin Zaheeruddin & Ors. vs State of Maharashtra & Ors. 2014 (2) Mh.L.J. 933* this Court had condoned delay of one year and seven months. He placed reliance on paragraphs 25, 26 and 28 and submitted that this Court had followed the Supreme Court in *Pundlik Patil vs. Executive Engineer, Jalgaon Medium Project and Anr. 2008 (17) SCC 448* and held that if the averments in the application for condonation of delay are incorrect or if incorrect statements are made in the application that by itself is sufficient to reject the application even without going into merits of the matter. Mr.Mali submitted that the reliance placed

by the School Tribunal on *Jahed Naziruddin (supra)* was incorrect. The said judgment further made reference to the case of *Balwant Singh vs. Jagdish Singh and Ors. 2010 (8) SCC 685* wherein the Supreme Court held that “sufficient cause” must be weighed in the scale of reasonableness and conduct of the party concerned. The basic principle is that justice must be done to both parties. The discretion must be exercised judiciously in terms of the Order XXII Rule 9(3), provisions of Section 5 of the Limitation Act. That the Court may take the liberal view while considering the prayer for condonation of delay, but not by ignoring the interest of justice. (emphasis supplied)

12. In *Jahed Naziruddin (supra)* paragraph 28 considered the provisions of Section 5 of the Limitation Act and upon careful perusal of the documents produced in that case, there was not the slightest doubt in the mind of the Court that the observations of the Appellate Authority are in consonance with material placed on record and the petitioner did not disclose correct and true facts before the Appellate Authority in support of his prayer for condonation of delay and that the foremost principle followed by a party while approaching the Court is that the party should come with clean hands.

13. On behalf of the respondent, Mr. Bandiwadekar while opposing the petition, in the affidavit in reply of respondent nos. 1 and 2 has

contended that the petitioner's case ought not to be considered since the Tribunal had come to the conclusion that sufficient cause has not been made out for condoning the delay and that the Tribunal has assigned legal and valid reasons. There is no error of law in refusing to condone the delay. Mr.Bandiwadekar submitted that even otherwise reliance placed on letter dated 24th November, 2016 would be of no avail to the petitioner since the letter was issued without consent and approval of the management of respondent no.2 and the petitioner could not have been asked to join by such letter.

14. The petitioner had been informed vide letter dated 17th February, 2017 that the letter dated 24th November, 2016 was issued without consent of the management. Mr.Bandiwadekar submitted that at the hearing of this writ petition a statement was made by him on behalf of the school that the letter dated 24th November, 2016 has already been withdrawn vide letter dated 17th February, 2017. The record indicates that on 10th February, 2017, the petitioner's counsel informed the Court that the respondent management is ready to take back the petitioner on certain conditions and time was sought on the said date. The respondent informed the petitioner that the letter has been withdrawn, although the order dated 10th February, 2017 does not indicate so the matter proceeded on the basis that the letter stood withdrawn.

15. According to Mr.Bandiwadekar, the petitioner remained absent from 30th June, 2014 after submitting a half day's leave application on 27th June, 2014. This leave came to be sanctioned. He sent a letter dated 30th June, 2014 in which he contended that the medical certificate is being sent for the period from 26th June, 2014 to 6th July. 2014. In that letter he did not seek leave. Thereafter no application for leave was submitted and no medical certificate was submitted. The petitioner joined on 30th July, 2014 and signed the muster but did not submit the original documents but addressed a legal notice to which reply was sent. According to Mr.Bandiwadekar, the petitioner did not send any application for leave but falsely contended that he had submitted original leave application along with the original medical certificates and incorrectly submitted that the respondent prevented him from signing the muster and resuming duties.

16. Mr.Bandiwadekar further submitted that this contention is wrong inasmuch as the original leave application and original medical certificates were filed on 23rd December, 2015 before the Tribunal at Exhibit-19. The Tribunal has recorded this fact and taken note of the conduct of the petitioner. It is submitted that the petitioner's case is concocted and the Tribunal has recorded the facts and taken note of the conduct of the petitioner. Mr.Bandiwadekar submitted that the approach of the petitioner is not honest. He has made false statement in the application

and he is not entitled to any relief in the petition. He pointed out that amongst various documents that the petitioner sought to rely upon there were affidavits of the employees working in the school. i.e. one of the clerk, Library Assistant and Senior Teacher. Perusal of these affidavits indicate that these were all got up evidence. The deponents did not have any personal knowledge as to what happened in the office of the Head Master and the office of the Education Officer as they were not present there. He submitted that the affidavits are apparently signed by the deponent but the name of the Advocate identifying them was mentioned but the Advocate has not signed, yet the notary seems to have notarised them without the Advocate identifying the deponent. According to Mr.Bandiwadekar the contents of all affidavits are identical and this creates doubt as to their correctness and the Tribunal had not accept these statements in the affidavits as true.

17. Mr.Mali, learned counsel for the petitioner conceded that there are some inadvertent errors in the contention of the petitioners apropos the submission of the original leave application and original medical certificates but he states that the petitioner has already apologised for this confusion and mis-statement including incorporating apology in the petition itself. He submitted that he has produced copies of the affidavits filed before the Tribunal which are signed by one Mr.Mohan Anant Chature working in the school as a Junior Clerk. Mr.Rohidas Sudam Gaikwad

working as Lab Assistant and Mr.Arvind Dashrath Pawar working as Senior Teacher in respondent no.2 – school. All of which are identically worded and as contended by Mr.Bandiwadekar.

18. Having heard this matter at length, it is obvious that there are inconsistencies in the case of the petitioner as set out in the application for condonation of delay. The impugned order records that on 8th January, 2015 the petitioner was directed to submit the original leave application and medical fitness certificate and that in the meantime the respondents have passed a resolution seeking his leave as leave without pay and not allow him to work when he is medically unfit. Accordingly, the school had demanded a leave application and medical certificates as per rules but the petitioner had failed to submit the same. The Education Officer has also directed the petitioner to submit the leave application and fitness certificate and the management had provided a copy of resolution on the same day but the petitioner has not submitted leave application and contended that he will submit it after two days. Even thereafter he failed to submit it.

19. According to the petitioner in one of the paragraphs in the application for condonation of delay the petitioner's Advocate had inadvertently mentioned that the original medical records have already been given to the school but the statement was erroneous due to miscommunication between his Advocate and him. The petitioner has

sought to apologise for this mistake albeit belatedly and in this petition. Mr.Mali submitted that reliance placed on *Jahed Naziruddin (supra)* was not correct especially in view of the fact that the contradictory stand of apropos submitting medical certificates was only on account of miscommunication by the Advocate and that the originals were not earlier tendered on account of genuine apprehension that they would not be available to the petitioner for future reference.

20. The impugned order rejects the contention of the petitioner that the respondent management is in contempt of the order of the Education Officer. On the contrary, it holds that the petitioner has disobeyed the order. After considering the reply of the respondent, the impugned order has in detail considered the facts of the case and found that the delay was not liable to be condoned.

21. After dealing with the arguments it is found that the delay in filing the appeal was about nine months. Reliance was placed on the decision of *Jahed Naziruddin (supra)* to show that the petitioner would not benefit by such delay. The impugned order records the submission of the Advocate for the respondents that authenticity of the medical certificate was doubtful and in the present case inspite of demanding original medical certificates and the original leave application, the petitioner contended, albeit incorrectly, that he has submitted original certificates. After the matter

was heard and kept for orders on 11th August, 2016 three affidavits came to be filed, the contents of which are questionable.

22. Having gone through the affidavits, the Tribunal was not inclined to accept the contents as true and after considering the submissions, it held that the contention of the petitioner that certificates had been provided to the school was falsified by his submitting originals before the Tribunal on 23rd December, 2015. Thus, the petitioner has failed to comply with the order passed by the Education Officer. All this led to the Presiding Officer of the Tribunal to conclude that as contemplated in *Jahed Naziruddin (supra)* the petitioner has not approached this Court with clean hands. In my view the predicament the petitioner faced was the result of the stand taken by the petitioner in suspecting that the original medical certificates, if submitted, would deprive him of evidence of his ailment. It appears to be a case where he suspected that after collecting medical certificates it would be used against him in some manner.

23. In my view the aforesaid suspicions are baseless. The reliefs that the petitioner seeks in the present petition in prayer clauses (b) and (c) cannot be granted by this Court and Mr.Mali being faced with this difficulty promptly did not pressed these prayers. The only relief that survives in the present petition is prayer clause (a) which assails the order

dated 21st October, 2016 declining to condone the delay. True, the petitioner has seemingly played truant with the school and this is not something that should be encouraged. However, in my view the fact that the petitioner has been in service for 20 years ought not be overlooked and that he appears to be a victim of circumstances which caused him behave in an erratic fashion. He ought not to be deprived of a chance to have his case considered on merits.

24. The impugned order has already considered the observations of the Supreme Court in *Collector, Land Acquisition, Anantnag vs. Mst. Katiji* 1987 CJ (SC) 155 to the effect that ordinarily a litigant does not stand to benefit by lodging an appeal late and that refusing to condone delay can result in a meritorious case be thrown out at the very threshold. It is very well settled that every day's delay need not be explained what needs to be considered and whether substantial justice has been done. Even in *Balwant Singh (supra)* the Supreme Court observed that the Court may take a liberal view while considering the prayer for condonation of delay but not by ignoring interest of justice. In the instant case the petitioner should be given an opportunity to urge his case on merits. Despite his aberrant behavior, in my view the interests of justice would be served if the petitioner is permitted to urge his appeal on merits after the delay is condoned. I therefore pass the following order :

- (i) The impugned order dated 21st October, 2016 is set aside.
- (ii) The petitioner shall appear before the School Tribunal on 15th January, 2018 at 11 am when the Tribunal will issue suitable directions fixing the appeal for hearing on merits.
- (iii) The petition is disposed of in the above terms.

(A.K.MENON,J.)