

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.07.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR  
AND  
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.A.No.1446 of 2018

R.Kumaravel ... Appellant

vs.

1.General Officer Commanding in Chief  
Southern Command  
Pune.

2.General Officer Commanding  
ANTKK & G Area HQ  
Island Ground, Chennai - 600 009.

3.Commanding Officer  
Station Workshop  
EME, Bangalore - 560 007.

.... Respondents

Prayer: Writ Appeal is filed under Clause 15 of Letters Patent, against the order, dated 01.09.2016 made in W.P.M.P.No.98 of 2015 in W.P.No.13313 of 1998.

W.P.M.P.No.98 of 2015

Pleaded to condone the delay of 2663 days in filing the miscellaneous Petition to Restoration of the writ Petition 13313 of 1998.

W.P.No.13313 of 1998

Petition filed under Article 226 of the Constitution of India Praying for the issuance of the writ of certiorarified of mandamus calling for the records dated:29/01/1997 on the file of the 3<sup>rd</sup> respondent herein and quash the same.

|                |                             |
|----------------|-----------------------------|
| For Appellant  | : R.Krishna Prasad          |
|                | M/s.Sarvabhaumon Associates |
| For Respondent | : V.Balasubramanian,        |

JUDGMENT

(Judgment of the Court was made by S.MANIKUMAR, J)

Instant writ appeal is directed against the order, dated 01.09.2016 made in W.P.M.P.No.98 of 2015 in W.P.No.13313 of 1998.

2. In the year 1998, the writ petitioner/appellant herein, has filed Writ Petition No.13313 of 1998, for the following reliefs:-

"Calling for the records of Summary Court Martial proceedings, dated 29.01.1997 in respect of the petitioner on the file of the third respondent, to quash the same and direct the respondents to reinstate the petitioner in service with back wages and all other consequential and attendant benefits."

3. Rebutting the same, Commanding Officer, Bangalore/3rd respondent herein, has filed a detailed counter affidavit and prayed for dismissal of the writ petition.

4. On 28.04.2008, when the matter came up for hearing, the petitioner/appellant, was absent. Thereafter, the matter was listed under the caption 'for dismissal', on 29.04.2008. On the said date, there was no representation, for the writ petitioner and hence, the writ petition has been dismissed for default.

5. Thereafter, the writ petitioner has filed W.P.M.P.No.98 of 2015, for restoration of the writ petition, with a delay of 2663 days in filing.

6. Before the Writ Court, the writ petitioner/appellant herein, has contended, as follows:-

"2. The case of the petitioner is that he joined the Military Service as a Sepoy in EME Corps. While so, he was tried by a Summary Court Martial (SCM) by Commanding Officer, who found him guilty of charges 1 and 3 and he was awarded the punishment of rigorous imprisonment for six months and he was dismissed from service. While he was in the Civil Prison, he made representations dated 13.02.1997 and 27.02.1997 before the first respondent requesting to consider his case sympathetically and to reinstate him in the service. But, the same has been rejected by the first respondent.

3. The petitioner challenged the Summary Court Martial before this Court, during August 1998, by way of filing writ petition in W.P.No.13313 of 1998, contending that the Summary Court Martial (SCM) proceedings were not held in a free, fair and just manner and he was not given an opportunity to engage a lawyer to contest the proceedings.

4. The respondent has filed a counter. The case was listed on 28.04.2008, the date on which, the petitioner was absent since, according to him, he was not aware of the case being listed on that day and hence, his counsel also could not appear before the Court. As there was no representation made on behalf of the petitioner, the writ petition was dismissed for default.

5. According to the petitioner, all these years, he was under the impression that the writ petition is still pending and only, during the third week of August 2015, he was able to get the details of the earlier counsel and came to know that the case has been dismissed for default.

6. The learned counsel for the petitioner submitted that the petitioner has a good case on merits and if the writ petition is not restored and transferred to the Armed Forces Tribunal, he will be put into serious hardship. He further submitted that now, the Armed Forces Tribunal Regional Bench has been constituted at Chennai and the jurisdiction to inquire this case is vested with the said Tribunal. Therefore, he has come forward with the petition to condone the delay of 2663 days in filing the Miscellaneous Petition for restoration of the writ petition.

7. The learned counsel appearing for the petitioner relied upon the following judgment in support of his submissions

(i) Judgment of the Supreme Court rendered in the case of State of Nagaland vs. Lipok Ao & Others (Appeal (Crl.) No.484 of 2005).

(ii) Judgment of the Supreme Court rendered in the case of Union of India and another vs. Tarsem Singh (Civil Appeal No.5151-5152 of 2008).

(iii) Judgment of the Delhi High Court rendered in the case of Ex.Sep.Sri Chand vs. Union of India (W.P.(C) No.148 of 2012).

(iv) Judgment of the Supreme Court rendered in the case of Ram Nath Sao @ Ram Nath Sahu and others vs. Gobardhan Sao and others (Appeal (Civil) No.1704 of 2002)

8. The learned counsel for the petitioner also contended that as per Section 592 of the Departmental Rules, the documents could not be disposed of as it has to be kept intact during the pendency of cases. Therefore, even if the

case is transferred to the file of the Tribunal, the documents pertaining to his case will be very much available for adjudication of the case."

7. Opposing the abovesaid contentions of the writ petitioner, Commanding Officer, Bangalore/third respondent herein, has filed a counter affidavit, before the Writ Court, and stated as follows:-

"9. The third respondent has filed a counter. In the counter, the third respondent first raised a question about the jurisdiction stating that the petitioner was serving at Bangalore at the time of his conviction and hence, no part of cause of action arose within the jurisdiction of this Court and hence, the writ petition is not maintainable.

10. No counter was filed by the first and second respondents. However, the learned counsel appearing for the first and second respondents contended that the delay is an inordinate delay and the documents are not available with them. Furthermore, the petitioner has also undergone the sentence. In that view of the matter, no useful purpose would be served in restoring the writ petition."

8. After hearing both sides, vide order dated 01.09.2016 in W.P.M.P.No.98 of 2015 in W.P.No.13313 of 1998, Writ Court, ordered as hereunder:-

"11. Heard both sides. On a careful consideration of the petition, it is seen that the petitioner, who worked in the armed forces, has lost his case and on going through the records, the Court has found that though the writ petition was filed in the year 1998, the case was listed on 18.07.2007. The docket order dated 18.07.2007 reads that the counsel for the petitioner was absent and posted the matter for dismissal next week. When the case was listed on 02.08.2007, it was adjourned by another week at the request of the learned counsel for the petitioner. Thereafter, it was again posted on 28.04.2008. On that day, the petitioner was absent once again and hence the case was posted on 29.04.2008 for dismissal, the date on which, the petitioner was also absent. Therefore, this Court by order dated 29.04.2008 has passed the order dismissing the case for default.

12. Now, in the affidavit of the present

petition to condone the delay, the petitioner has stated that he bona fide believed that the case was pending for the past 15 years and only in the year 2015, he came to understand that it was dismissed for default on 29.04.2008. Can a person like the petitioner be expected to keep quiet without appraising of the status of the case for a long period of at least 7 to 8 years. The writ petition was filed in the year 1998. The case has been listed from the year 2007 regularly. Neither the petitioner has taken any interest to contest the case nor to get instruction from his counsel. But, the petitioner has stated that till the year 2015, he was under the impression that the case is pending. Therefore, the only reason for condonation of the inordinate delay of 2663 days is that the petitioner was under the impression that the case is pending for the past 15 years, which cannot be accepted. No doubt, the petitioner has come to this Court for condonation of the delay. Furthermore, the petitioner has taken such long time to restore the writ petition which was dismissed for default. The petitioner has also undergone the punishment period as awarded by the Summary Court Martial. In any event, the reasons assigned by the petitioner for condoning the delay is not justifiable. The delay is onerous and it was not properly explained. Hence, I do not find any merits in the present petition filed to condone the delay. The judgment relied on by the petitioner does not support his case especially in view of the inordinate delay of more than eight years in restoring the writ petition. Further, the reasoning given in the affidavit filed in support of the petition for condonation of delay is not sufficient to condone the delay. Accordingly, this petition is dismissed."

9. Being aggrieved by the same, the instant writ appeal has been filed, on the following grounds:-

"(i) The learned Judge has failed to take into account of the fact that by dismissal of the petition filed by the appellant to condone the delay in filing the restoration petition substantial justice has been denied to an ex-serviceman who had scarified his entire youth in the discharge of arduous tasks in difficult

terrain and extreme climatic conditions for the cause of the nation.

(ii) The learned Judge has erred in not taking into account of the fact that no prejudice would be caused to the respondents if the delay is condoned and on the other hand great prejudice would be caused to the appellant.

(iii) The learned Judge has failed to take into account of the various judgments rendered by the Hon'ble Apex Court as well as this Court wherein it was repeatedly held that lenient view should be adopted for condoning the delay application for rendering justice to the client.

(iv) The learned Judge has failed to appreciate that the appellant has shown sufficient cause for the delay in preferring the petition.

(v) The learned Judge ought to have use its discretionary power when the appellant has good case to urge on merits.

(vi) The learned Judge ought to have considered the fact that it was due to the fault of the advocate the matter was dismissed for default and therefore the client should not have been upnished for the fault of his advocate."

10. Heard the learned counsel for the appellant and perused the materials available on record.

11. Issue to be decided by us, is whether the Writ Court was right in dismissing the restoration petition, filed with a delay of 2663 days in filing the petition, and whether the Writ Court, has considered as to whether there was diligence on the part of the appellant and sufficient cause shown. On the above aspects, we deem it fit, to consider a decision of the Hon'ble Supreme Court, in H.Dohil Constructions Company Private Limited V. Nahar Exports Limited and Another, reported in 2015(1) Supreme Court cases 680, wherein at paragraph Nos.23 and 24, held as follows:

"23. We may also usefully refer to the recent decision of this Court in Esha Bhattacharjee [Esha Bhattacharjee v. Raghunathpur Nafar Academy, reported in (2013) 12 SCC 649], where several principles were culled out to be kept in Principles (iv), (v), (viii), (ix) and (x) of para 21 can be usefully referred to, which read as under: (SCCp.658-59)

"21.4(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9 (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weight the scale of balance of justice in respect of both parties and the said principle cannot be given a total go-by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

24. When we apply those principles to the case on hand, it has to be stated that the failure of the Respondents in not showing due diligence in filing of the appeals and the enormous time taken in the refiling can only be construed, in the absence of any valid explanation, as gross negligence and lacks in bonafides as displayed on the part of the Respondents. Further, when the Respondents have not come forward with proper details as regards the date when the papers were returned for refiling, the non-furnishing of satisfactory reasons for not refiling of papers in time and the failure to pay the Court fee at the time of the filing of appeal papers on 06.09.2007, the reasons which prevented the Respondents from not paying the Court fee along with the appeal papers and the failure to furnish the details as to who was their counsel who was previously entrusted with the filing of the appeals cumulatively considered, disclose that there was total lack of bonafides in its approach. It also requires to be stated that in the case on hand, not refiling the appeal papers within the time prescribed and by allowing the delay to the extent of nearly 1727 days, definitely calls for a stringent scrutiny and cannot be accepted as having been explained without proper reasons. As has been laid down by this Court, Courts are required to weigh the scale of balance of justice in respect of both parties and the same principle cannot be given a go-by under the guise of liberal approach even if it pertains to refiling. The filing of

an application for condoning the delay of 1727 days in the matter of refiling without disclosing reasons, much less satisfactory reasons only results in the Respondents not deserving any indulgence by the Court in the matter of condonation of delay. The Respondents had filed the suit for specific performance and when the trial Court found that the claim for specific performance based on the agreement was correct but exercised its discretion not to grant the relief for specific performance but grant only a payment of damages and the Respondents were really keen to get the decree for specific performance by filing the appeals, they should have shown utmost diligence and come forward with justifiable reasons when an enormous delay of five years was involved in getting its appeals registered."

A Hon'ble Division Bench judgment of this Court in Tamilnadu Mercantile Bank Ltd., Vs. Appellate Authority, reported in (1990) 1 LLN 457, held thus:-

"14. We are unable to agree with the reasoning of the learned Judge that no litigant ordinarily stands to benefit by instituting a proceeding beyond time. It is common knowledge that by delaying a matter, evidence relating to the matter in dispute may disappear and very often the party concerned may think that preserving the relevant records would be unnecessary in view of the fact that there was no further proceeding. If a litigant chooses to approach the Court long after the time prescribed under the relevant provisions of the law, he cannot say that no prejudice would be caused to the other side by the delay being condoned. The other side would have in all probability destroyed the records thinking that the records would not be relevant as there was no further proceeding in the matter. Hence to view a matter of condonation of delay with a presupposition that no prejudice will be caused by the condonation of delay to the respondent in that application will be fallacious. In our view, each case has to be decided on the facts and circumstances of the case. Length of the delay is a relevant matter to be taken into account while considering whether the delay should be condoned or not. It is not open to any litigant to fix his own period of limitation for instituting proceedings for which law has prescribed period of limitation.

17.... Once it is held that a party has lost his right to have the matter considered on merits because

of his own inaction for a long time, it cannot be presumed to be non-deliberate delay, and in such circumstances of the case, he cannot be heard to plead that substantial justice deserved to be preferred as against technical considerations. We are of the view that the question of limitation is not merely a technical consideration. Rules of limitation are based on principles of sound public policy and principles of equity. It is a litigant liable to have a Damocles' sword hanging over his head indefinitely for a period to be determined at the whims and fancies of the opponent?"

12. In the light of the decisions of the Hon'ble Supreme Court, extracted and considered, testing the correctness of the order of the writ Court, impugned before us, we are of the view that the appellant has made allegations against his counsel, and try to extricate himself, from bonafidely and diligently prosecuting the lis. This Court is of the considered view, that the appellant has not bonafidely prosecuted his case. Applying the abovesaid judgments to the facts of this case, we are of the considered view that the appellant, has not made only a case for interference with the order of the Writ Court.

13. In the light of the decisions and discussions, writ appeal is dismissed.

Sd/-  
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

dm

To

1.General Officer Commanding in Chief  
Southern Command  
Pune.

2.General Officer Commanding  
ANTKK & G Area HQ  
Island Ground, Chennai - 600 009.

3.Commanding Officer  
Station Workshop  
EME, Bangalore - 560 007.

+lcc to M/s.Sarvabhaumon Associates, Advocate, S.R.No.46513

+lcc to Mr.V.Balasubramanian,, Advocate, S.R.No.46241

W.A.No.1446 of 2018

RR(CO)

GSP(26/11/2018)