

C.M.P.Nos.18612 and 18614 of 2019
in
W.A.Sr.Nos.100341 and 100345 of 2019

S.MANIKUMAR, J.
AND
D.KRISHNAKUMAR, J.

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

Instant W.A.Sr.Nos.100341 and 100345 of 2019, are filed against the common order made in W.P.Nos.32597 and 32598 of 2017, dated 14.12.2017. Appeals have been filed with delay of 556 days in filing the instant W.A.Sr.Nos.100341 and 100345 of 2019.

2. Reasons assigned in supporting affidavit, are that the appellants have received the copy of the order dated 25.01.2018. After receiving the copy of the order, the Development Commissioner, MPEZ Special Economic Zone and HEOUS, Chennai/the 3rd appellant herein, has placed the same before the Higher Authorities for their consent. After obtaining the consent to file the writ appeals, the same was done on 02.08.2019, which has resulted in delay of 556 days.

3. At the time, when the petition came up for hearing, Mr.J.Prasanna Kumar, learned counsel for the first respondent submitted

that the computation of number days of delay, has not been properly done. He further submitted that delay is more than 556 days.

4. On the above submission, we perused the entries made by the Superintendent, Copy Section, High Court, Madras.

5. From the above it could be deduced that though order made in W.P.Nos.32596 to 32598 of 2017, was dated 14.12.2017, copy application has been made on 11.01.2019. Copy was made ready on 21.01.2019 and delivered on 23.01.2019. After obtaining the same, instant W.A.Sr.Nos.100341 and 100345 of 2019, have been filed on 02.08.2019. Thus, there is a delay in filing copy application between 14.12.2017 and 11.01.2019. There is a further delay from 23.01.2019 to 02.08.2019. Thus, if delay is computed by the above method, after deducting 30 days, the time prescribed for filing the appeal, the number of days delay, works out to 556 days. Thus, there is not only error in calculating the number of days delay, but, also an error in the averments made in Paragraph No.8 of the supporting affidavit, filed to condone the delay.

6. Though, Mr.J.Prasanna Kumar, learned counsel for the first

respondent prayed for the dismissal of the petition filed for condonation,

we are not inclined to accept the said contention for the reason that what is struck down by the Writ Court, is the Policy Circular No.16 (RE-2012/2009-14), dated 15.03.2013, issued by the Director General of Foreign Trade, Government of India, Ministry of Commerce and Industry, New Delhi/the 2nd appellant herein, and the consequential direction to Development Commissioner, MPEZ Special Economic Zone and HEOUS, Chennai/the 3rd appellant herein, for refund of the Terminal Excise Duty (TED) for the period of March 2012 for Rs.1,34,09,863/-.

7. Considering the nature of the relief granted, i.e. striking down the Policy Circular No.16 (RE-2012/2009-14), dated 15.03.2013, we cannot ignore the right of appeal, as against the common order made in W.P.Nos.32597 and 32598 of 2017, dated 14.12.2017.

8. It is trite law that pitted against substantial justice, delay requires to be condoned. In **Sankaran Pillai vs. V.P.Venguduswami**, reported in **AIR 1999 SC 3060**, the Hon'ble Supreme Court held that,

"The question that is required to be seen is, what does the expression 'sufficient cause' means in sub-section (4) of Section 11 of the Act? It is no doubt true that the expression 'sufficient cause' has to be liberally construed to do substantial justice between the parties.

But the expression 'sufficient cause' necessarily implies an element of sincerity, bonafide, and reasonableness".

9. Inaction on the part of the appellant in not prosecuting the appeal from 2017 to 2019 for two years is apparent on the face of record. As per Wharton's Dictionary, diligence means,

"Care, of which there are infinite shades, from the slightest momentary though to the most vigilant anxiety; but the law recognises only three degrees of diligence: (1) Common or ordinary, which men in general exert in respect of their own concerns; the standard is necessarily variable with respect to the facts, although it may be uniform with respect to the principle. (2) High or great, which is extraordinary diligence or that which very prudent persons take of their own concerns. (3) Low or slight, which is that which persons of less than common prudence or indeed of no prudence at all, take of their own concerns."

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10. Due diligence, considered by the Hon'ble Supreme Court in Chander Kanta Bansal Vs. Rajinder Singh Anand, reported in (2008) 5 SCC 117, is extracted hereunder:-

"16. The words "due diligence" has not been defined in the Code. According to Oxford Dictionary

(Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."

11. On the aspect of condonation of delay, reasons to be assigned, contents of the supporting affidavit, the Hon'ble Supreme Court, in **Esha Bhattacharjee v. Raghunathpur Nafar Academy**, reported in (2013) 12 SCC 649, has broadly culled out the principles of law to be considered in the matter of condonation and it is suffice to extract paragraph No.21 from **Esha Bhattacharjee's** case.

broadly be culled out are;

21.1. (i) *There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.*

21.2. (ii) *The terms “sufficient cause” should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.*

21.3. (iii) *Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.*

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.*

21.6. (vi) *It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.*

21.7. (vii) *The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot*

be allowed a totally unfettered free play.

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 weigh 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.”

In the above reported case, the Apex Court also considered the aspect of delay in refiling of the appeal and on the facts and circumstances of the case, observed that it was without disclosing the reasons, much less satisfactory reasons. In *H.Dohil constructions case*, it was a delay of 1727 days in refiling.

12. It is also useful to extract paragraph Nos.14 to 17 of the judgment in *Tamilnadu Mercantile Bank's case*.

“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?"

13. In view of the above, this Court is inclined to condone the delay

<http://www.judis.nic.in> of 556 days, on condition that the petitioners/appellants, pays a sum of

Rs.2,000/- in each appeal to the first respondent herein, within a period of one week from the date of receipt of a copy of this order, failing which failing which, C.M.P.Nos.18612 and 18614 of 2019 in W.A.Sr.Nos.100341 and 100345 of 2019, would stand dismissed, without any further reference to this Court. C.M.P.Nos.18612 and 18614 of 2019 in W.A.Sr.Nos.100341 and 100345 of 2019, are ordered accordingly.

14. On such payment and production of proof thereof, Registry is directed to number the appeals and list the same for admission.

(S.M.K., J.) (D.K.K., J.)
19.09.2019

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Note:
Issue order copy on 20.09.2019.

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