

C.M.P. No.24620 of 2019 in
C.M.A. SR No.142047 of 2019

S.VAIDYANATHAN, J.

Petitioner has come forward seeking condonation of delay of 89 days in filing the present civil miscellaneous appeal. For the purpose of disposing of this application, this court does not want to delve into the merits and various other factual aspects, except to the fact that there is an arbitration proceedings pending before the Arbitrator and the petitioner has filed a counter-claim. For the same relief, he has already filed a civil suit, which is also pending.

2. Respondent herein was continuously losing the battle before the court and ultimately pursuant to the orders of the Apex Court, the respondent herein was permitted to proceed with the arbitration proceedings. In the meantime, the petitioner herein has withdrawn the counter-claim even though for the same relief, as stated supra, a civil suit is also pending. The Arbitrator has rejected to restore the counter-claim on file against which, the present civil miscellaneous appeal has been filed with a delay of 89 days.

3. The issue that arises for consideration is, whether the delay of 89 days has got to be condoned or not?

4. It is not in dispute that a lawyer was engaged by the petitioner, who has been asked to handle the matter, both in the civil suit as well as in the arbitration proceedings. In the arbitration proceedings, counter-claim has been filed by the petitioner herein. On account of the matter pending before the High Court and thereafter before the Supreme Court, the petitioner has chosen to withdraw the counter-claim before the Arbitrator, as the party was under the impression that two parallel proceedings cannot be proceeded with. According to the petitioner, the counsel who was handling the matter earlier, revoked Vakalat and he had to make necessary arrangements to engage a new counsel, collect the papers from the former counsel, instruct the new counsel, who has to settle the papers and make arrangements for participation in the proceedings. The petitioner has stated in the affidavit that the counsel who was appearing earlier, after revocation of Vakalat, they were left with no other legal advice and that they have to take the advice of the present counsel and also to collect the documents for the proceedings to be contested.

5. The respondent would state that, it is not the counter claim has been filed after the orders of the Supreme Court, but as stated by the petitioner, there were two parallel proceedings with regard to the relief sought for by the petitioner herein and one is in the form of a counter claim before the Arbitrator and other one was a suit filed in the year 2009. Having chosen to withdraw the counter claim and not sought liberty, either before the Arbitrator or before the Apex Court, when the respondent herein was permitted to approach the Arbitrator, the petitioner herein is barred from either making a fresh counter claim or trying to restore the counter claim already filed. Though this issue need not be gone into in the present application to condone the delay, as there are no reasons more so genuine reasons and that there are inconsistent stands taken by the petitioner in the present affidavit, as could be seen from the correspondence between the parties, namely the erstwhile lawyer and the petitioner that there was no proper instruction and hence he has no other option except to opt out from the proceedings. Relevant paragraph of the communication dated 23.8.2019 is extracted hereunder:

"However, the respondent has not been providing any instructions to our office to proceed with the matter. The respondent is also due and payable, our professional fees and the expenses we have incurred towards

arbitration. Our office had also been reminding the respondent with regard to the Arbitrator's fees. Till date, we have neither obtained the instructions nor the payments. In these circumstances, we have already informed the respondent that we would not be in a position to represent them any further. The respondent had intimated that their directors were not in country and had asked us to seek time. We are hence sending this communication to your good office to record that our office would not be representing the said respondent any further and suitable communication be sent by the Honourable Tribunal with respect to the arbitration proceedings directly."

6. In reply, the present counsel appearing for the petitioner, would submit that, after they entered appearance, the Arbitrator fees and other dues alleged not to have been disbursed, have been paid and that they have come on only during September 2019 and that they were not aware of the communication dated 23.8.2019. In any event, on technicalities, the relief could not be deprived and the party shall have to get an order on merits, based on the documents produced before the court. He would further submit that there is no reason to withdraw the counter claim which was made in the year 2015, when for the similar relief, a suit has been filed, which was

pending from 2009. The dismissal of the application, would close the shutters for the petitioner to get any type of relief from the Arbitrator for no fault of him. Hence the delay may be condoned and that they have a good case on merit in the civil miscellaneous appeal, as the Arbitrator ought to have entertained the counter claim once the Supreme Court grants relief to the respondent to approach the Arbitrator and only after the orders of the Supreme Court in November 2018, the proceedings deemed to have been commenced and the clock is set back for the entire proceedings to go on.

7. As could be seen from paragraphs 4 and 6 of the affidavit filed in support of the condone delay petition and the communication dated 23.8.2019 between the erstwhile lawyer and the petitioner herein, I am of the view that the previous counsel has not been instructed by the petitioner in order to enable him to proceed with the matter. Even though it is stated that fee due to the Arbitrator and the amount have been paid subsequently on the date, namely 23.8.2019, nothing was cleared and the counsel has taken right decision. On account of no instructions, he produced a letter dated 23.8.2019 from which fact, it is very clear that he has not revoked his Vakalat, but has stated that he cannot appear in the matter. As contradictory stands

have been taken by the petitioner herein, this court is of the view that there are no germane reasons to condone the delay of 89 days.

8. The Hon'ble Supreme Court in **Brijesh Kumar vs. State of Haryana** reported in **AIR 2014 SCC 1612** held that, if the delay is not properly and satisfactorily explained, it cannot be condoned merely on the sympathetic ground. Following the said judgment, a Division Bench of this Court (in which I was one of the parties) in the case of **M/s.Ruskim Sea Foods Limited v. M/s.Evergreen Sea Foods Pvt., Ltd., represented by its Managing Director [C.M.P.Nos.21784 and 21785 of 2017 in O.S.A.SR.No.79476 of 2017, decided on 15.02.2018]**, was pleased to hold as under:

"32. Ordinarily, the 'Condonation of Delay' is a matter of discretion to be exercised by the Concerned Court. Also, it is true that the length and breadth of delay is not relevant, but the acceptance of explanation can only be a relevant criterion for the concerned Court to deal with / condone the aspect of 'Condonation of Delay'. However, in this regard, the Petitioner / concerned litigant is to offer / ascribe sufficient reasons or project sufficient cause or good cause to condone the delay with a view to enable the Concerned Court to take a liberal view with a view to secure the ends of justice.

33. It is to be borne in mind that the term 'Sufficient Cause' under Section 5 of the Limitation Act, 1963 is an elastic one to enable the Court to apply the Law in a meaningful

*fashion, with a view to secure the ends of justice. However, 'Sufficient Cause' / 'Good Cause' is a condition precedent for exercise of discretion by the Concerned Court in regard to the 'Condonation of Delay'. If the delay in question is not either properly or satisfactorily and convincingly explained, the Court of Law cannot condone the delay on sympathetic ground alone, as per decision of **Hon'ble supreme Court BrijeshKumar V. State of Haryana** reported in **AIR 2014 SCC at Page 1612**.*

34. In considering a Petition for 'Condonation of Delay', no straight jacket cast iron formula is enunciated to arrive at a conclusion if sufficient / good grounds are made out or not. In short, each case is to be looked into based on the facts and circumstances, in which a litigant acts / conduct himself, in the considered opinion of this Court. 'Where a sufficient cause' or 'good cause' is not shown, then, no question of 'Condonation of Delay' arises, as opined by this Court."

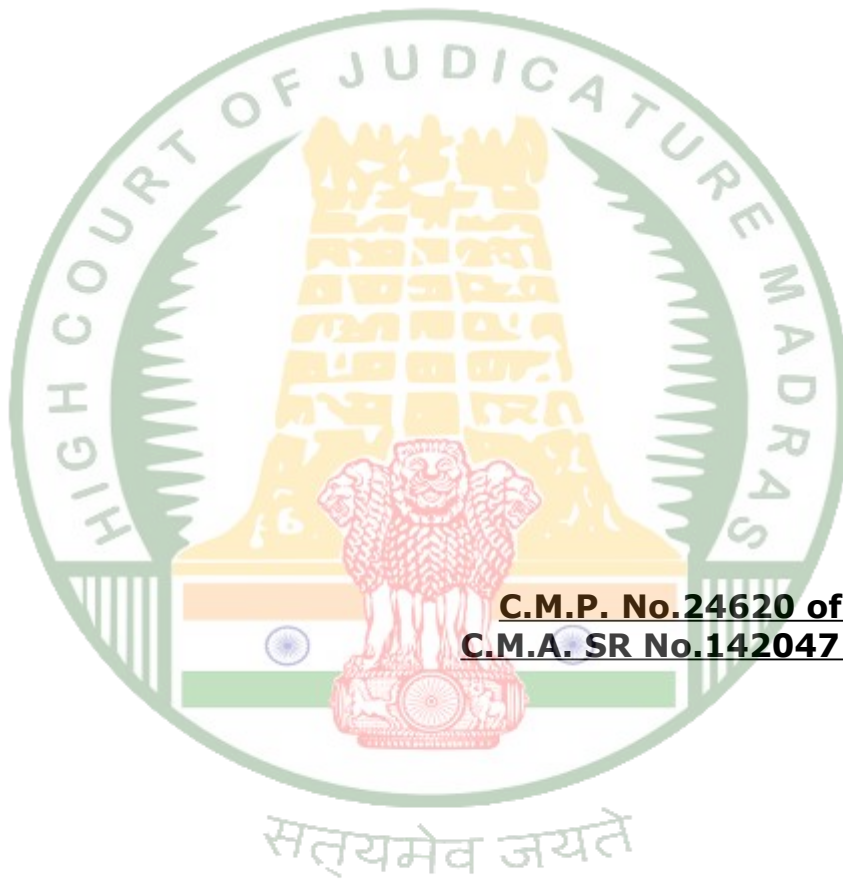
9. In view of the aforesaid judgments of the Hon'ble Supreme Court as well as this court, this court is of the view that this petition has no legs to stand. Accordingly, the civil miscellaneous petition is dismissed. Registry is directed to return the CMA papers to the counsel for the appellant.

06.12.2019

Asr

S.VAIDYANATHAN, J.

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