ODC-7 & 8

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

APOT/142/2022
With
AP/229/2021
IA NO.GA/2/2022, GA/3/2022

EASTERN BANK LIMITED
-VS-
M/S. KSE ELECTRICALS PRIVATE LIMITED AND ORS.

AND

APOT/143/2022
With
AP/229/2021
IA NO.GA/2/2022, GA/3/2022

EASTERN BANK LIMITED
-VS-
M/S. KSE ELECTRICALS PRIVATE LIMITED AND ORS.

BEFORE:
The Hon'ble JUSTICE HARISH TANDON

The Hon'ble JUSTICE PRASENJIT BISWAS
(COMMERCIAL DIVISION)
Date : 1st December, 2022.

<u>*Appearance:*</u>
Mr. Anirban Ray, Adv.
Mr. Tanoy Chakraborty, Adv.
Mr. Chhandak Dutta, Adv.
Mr. Shayak Mitra, Adv.
Mr. Rajiv Lochan Chakraborty, Adv.
Ms. Vaswati Chakraborty, Adv.
…for the appellant

Mr. Sabyasachi Chaudhary, Adv.
Mr. Rajarshi Dutta, Adv.
Mr. Vishwarup Acharyya, Adv.
…for the respondent no.1

Ms. Suchismita Ghosh Chatterjee, Adv.
...for the respondent no.3

The Court: APOT/142/2022 and APOT/143/2022 are taken up together for a limited purpose of condonation of delay in preferring the same.

Both the appeals are aimed against the orders dated 15th June, 2021 and 23rd November, 2021, respectively. For the purpose of record, it is made clear that the interim order of injunction was passed on 7th May, 2021 which was modified by a subsequent order dated 15th June, 2021 related to the number of the bank guarantee issued by the appellant in favour of the respondent no.2. The order of 7th May, 2021 is confirmed by the subsequent order dated 23rd November, 2021 which is also a subject-matter of challenge in the instant appeals.

Since the appellant was not a party to the proceeding initiated under Section 9 of the Arbitration and Conciliation Act, 1996, the instant appeals were filed seeking leave to appeal which was eventually granted on 8th September, 2022. Granting leave to appeal is primarily decided on the premise whether a person is aggrieved by the order impugned therein which is totally different to the application for condonation of delay which are basically decided upon recording the satisfaction that the appellant was prevented by a sufficient cause in not preferring the appeal within the statutory period provided therefor.

Bearing in mind the proposition of law relating to the condonation of delay and the sufficiency of the cause being shown, we venture to decide the application for condonation of delay on such parameter.

We are not unmindful of the proposition of law that the Court enjoins power to condone the delay provided the sufficient cause is shown as the length of the delay is immaterial in this regard. The delay of shorter period may not be condoned in absence of the sufficient cause; on the other hand the delay of longer period may be condoned if the Court finds that the applicant was prevented by sufficient cause in not filing the appeal within the statutory period. The one and the foremost object for condonation of delay is that the person who was diligent and took all the care in proceeding with the litigation but was prevented by the circumstances beyond his control and no laches or negligence can be attributed to his conduct.

The aforesaid principles of law when viewed in juxtaposition with a case emanating under the Commercial Courts Act, 2015, the consideration on the sufficiency of the cause is to be just and proper keeping in mind the object and the purpose behind the incorporation of the said Act. The Commercial Courts Act was promulgated with the solemn object to provide the speedy disposal of high-value commercial disputes and a special fora was created in the nature of Commercial Court and the Commercial Appellate Division of the High Court to adjudicate such disputes within the time-frame. The question often arises as to whether there should be a shift in the consideration in relation to a condonation of delay in respect of a matter emanating from the Commercial Court or the general principles laid down in respect of the no-answers of the condonation would apply and to be projected affront in such matter.

The enlightening observations of the Apex Court rendered in the case of G*overnment of Maharashtra (Water Resources Department) represented by Executive Engineer vs. Borse Brothers Engineers & Contractors Private Limited* reported in (2021) 6 SCC 460 is required to be recapitulated and applied in this perspective.

The three-Judge Bench of the Apex Court, in the said report, was considering an application for condonation of delay in the light of the judgment of the Division Bench of the Supreme Court rendered in the case of N.V. International vs. State of Assam reported in (2020) 2 SCC 109. The three-Judge Bench upon noticing the provisions contained in Section 37 of the Arbitration and Conciliation Act, 1996 conjointly with Section 43 thereof was of the view that the provisions of the Limitation Act will apply to an appeal filed under Section 37 and since the different periods of limitation have been provided under Articles 116 and 117 of the Limitation Act, the aforesaid provisions are applicable in specified situations contemplated therein and, therefore, there is no inconsistency and incongruity that Section 5 applies to an appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996. However, when such condonation is sought in relation to a proceeding emanating from Commercial Courts Act, 2015, the said Bench faced the vexed question whether Section 5 of the Limitation Act is excluded by the scheme of the said Commercial Courts Act. The Bench further noticed that there is no provision in the Commercial Courts Act relating to a period of limitation coupled with the condonation of delay so far as the appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is concerned. However, sub-Section (a) of Section 13 of the Act contemplates a period of limitation of 30 days from the date of the judgment and order passed by the Commercial Court. Although the period of limitation can be assumed from the aforesaid provisions yet the Act is conspicuously silent on the condonation of delay. Ultimately it was held that although the provisions contained in Section 5 of the Limitation Act applies with full force and rigour yet has to be circumscribed with the object and the context provided by the aforesaid statute which propagates and propels the speedy disposal of appeals filed under Section 37 of the Arbitration and Conciliation Act. The aforesaid Bench succinctly discussed the expression "sufficient cause" in the context of condonation of delay in filing the appeal under Section 37 of the Arbitration and Conciliation Act, 1996 and held that it is not so wide or elastic enough to cover inordinate delays beyond the stipulated time nor is a loose panacea for the ill of pressing negligent and stale claims in the following:

> "58. Given the object sought to be achieved under both the Arbitration Act and the Commercial Courts Act, that is, the speedy resolution of disputes, the expression "sufficient cause" is not elastic enough to cover long delays beyond the period provided by the appeal provision itself. Besides, the expression "sufficient cause" is not itself a loose panacea for the ill of pressing negligent and stale claims. This Court, in Basawaraj v. LAO, has held: (SCC pp.85-88, paras 9-15)
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> > "9. Sufficient cause is the cause for which the defendant could not be blamed for his absence. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude, which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case, duly examined from the viewpoint of a reasonable standard of a cautious man. *In this context, "sufficient cause" means that the party should not have acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has "not acted diligently" or "remained inactive".* However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. The applicant must satisfy the court that he was prevented by any "sufficient cause" from prosecuting his case, and unless a satisfactory explanation is furnished, the court should not allow the application for condonation of delay. The court has to examine whether the mistake is bona fide or was merely a device to cover an ulterior purpose. (See Manindra Land and Building Corpn. Ltd. v. Bhutnath Banerjee , Mata Din v. A. Narayanan , Parimal v. Veena and Maniben Devraj Shah v. Municipal Corpn. of Brihan Mumbai.
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> > 10. In Arjun Singh v. Mohindra Kumar this Court explained the difference between a "good cause" and a "sufficient cause" and observed that every "sufficient cause" is a good cause and vice versa. However, if any difference exists it can only be that the requirement of good cause is complied with on a lesser degree of proof than that of "sufficient cause".

11. The expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done, but only *so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned*, whether or not sufficient cause has been furnished, can be decided on the facts of a particular case and no straitjacket formula is possible. (Vide *Madanlal v. Shyamlal and Ram Nath Sao v.Gobardhan Sao*.)

12. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. 'A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation.' The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim *dura lex sed lex* which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

13. The statute of limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale. According to *Halsbury's Laws of England, Vol. 28,Para 605 p. 266*:

> '605. *Policy of the Limitation Acts.*—The courts have expressed at least three differing reasons supporting the existence of statutes of limitations namely, *(1)* that long dormant claims have more of cruelty than justice in them, *(2)* that a defendant might have lost the evidence to disprove a stale claim, and *(3)* that persons with good causes of actions should pursue them with reasonable diligence.'

An unlimited limitation would lead to a sense of insecurity and uncertainty, and therefore, limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches. *(See Popat and Kotecha Property v. SBI Staff Assn. , Rajender Singh v. Santa Singh* and *Pundlik Jalam Patil v. Jalgaon Medium Project.*

14. *In P. Ramachandra Rao v. State of Karnataka* this Court held that judicially engrafting principles of limitation amounts to legislating and would fly in the face of law laid down by the Constitution Bench in *Abdul Rehman Antulay v. R.S. Nayak* .

15. The law on the issue can be summarised to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain the court as to what was the "sufficient cause" which means an adequate and enough reason which prevented him to approach the court

> within limitation. In case a party is found to be negligent, or for want of bona fide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this Court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature." *(emphasis supplied)"*

The Bench further held:

> "63. Given the aforesaid and the object of speedy disposal sought to be achieved both under the Arbitration Act and the Commercial Courts Act, for appeals filed under section 37 of the Arbitration Act that are governed by Articles 116 and 117 of the Limitation Act or section 13(1-A) of the Commercial Courts Act, a delay beyond 90 days, 30 days or 60 days, respectively, is to be condoned by way of exception and not by way of rule. In a fit case in which a party has otherwise acted bona fide and not in a negligent manner, a short delay beyond such period can, in the discretion of the court, be condoned, always bearing in mind that the other side of the picture is that the opposite party may have acquired both in equity and justice, what may now be lost by the first party's inaction, negligence or laches."

The ratio culled out from the aforesaid judgment meets no ambiguity in our mind that despite the Court enjoining the power to condone the delay in filing an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 and the Commercial Courts Act, 2015 yet the approach should be such that it would not frustrate the object and the purpose underlining the incorporation of the aforesaid statutes. In other words, in case there has been a long delay, the Court must exercise its discretion taking into account the rights and the prejudices of the opposite party having acquired justice which should not be allowed to be diminished because of the latches and inaction on the part of the appellant in filing the appeal within the statutory period. The power to condone the delay should be exercised in an exceptional circumstances and not as a rule because of the unique nature of the provisions contained in the aforesaid Acts and the object sought to be achieved.

On the contour of legal principles deciphered from the above noted report, we embark upon the grounds made out by the appellant in an application for condonation of delay and to ascertain whether the same constitutes a sufficient cause inviting the Court to exercise the discretion by condoning the delay.

Admittedly, the appellant is not a party to a proceeding under Section 9 of the Arbitration and Conciliation Act which was between the respondents herein. The respondent no. 2 herein floated a notice inviting tender on 18th October, 2014 for supply of line hardware of specifications to upgrade the rural electricity distribution system at Dhaka in Bangladesh. The respondent no. 1 was declared successful bidder and the later of acceptance was issued for execution and procurement of the specified goods. The respondent no. 1 was required to furnish a performance guarantee for a period of twenty months in terms of the obligations contained in general conditions of contract. As submitted, the bank guarantee caused to be issued by the State Bank of India, Dhaka branch was extended from time to time. Subsequently, the same was replaced by a performance bank guarantee issued by the respondent no. 3 through its corresponding bank, that is the appellant in Dhaka, Bangladesh and the same remained valid until the dispute arose between the parties.

We have been given to understand that the arbitral proceedings are continuing and an interim award to the tune of Rs. 3, 60,000/- US dollar for securing the said amount has already been passed by the arbitral tribunal. Be that as it may, amidst the pendency of the aforesaid arbitral proceedings, an application under Section 9 was taken out by the respondent no. 1 seeking interim order as the parties thereto were contemplating to invoke the bank guarantee. By an order dated 7th of May, 2021, the Single Bench of this Court passed an interim order restraining the respondent no. 2 herein from invoking the bank guarantee bearing no. 999CGO1190910182 dated 1st April, 2019 renewed on 12th February, 2021 until 25th of May, 2021. Simultaneously, the respondent no. 3 was also restrained from making any payment and/or disbursement under the said bank guarantee in terms of the letter of invocation said to have been received on 6th of May, 2021 or otherwise until 25th of May, 2021. The said interim order was extended from time to time and the parties were directed to exchange the affidavits. On 15th June, 2021 when the matter was again listed, it was pointed out by the learned Advocate representing the respondent no. 3 herein that they do not intend to file an affidavit. Rather it was pointed out that the number of the bank guarantee which is recorded in the order dated 7th of May, 2021 is required to be corrected and, in fact, the same was done which, according to the appellant, affects the right as the said bank guarantee pertains to a counter guarantee issued by them under the agreement with the said respondent no. 3. Subsequently, an application for vacation of the interim order was taken by the respondent no. 3 and, by the final order dated 23rd November, 2021, the application for vacation of the interim order was rejected and the interim order granted on 7th of May, 2021 as modified on 15th June, 2021 was made absolute.

According to the petitioner, the aforesaid orders dated 7.5.2021 and 15th June, 2021 were duly communicated to them and the request was made by the petitioner to the said respondent no. 3 to take immediate steps for vacation of the said interim order in the fag end of the month of June, 2021. It is further stated that pursuant to such request, the respondent no. 3 took out the application for vacation of the interim order and, ultimately, the said application was dismissed on 23rd of November, 2021 which was communicated to them on 25th of November, 2021. The pleading would further proceed that in the month of January, 2022 the petitioner had to approach the Counsel practicing in this Court as the respondent no. 3 showed willingness not to prefer any appeal against the said order dated 23rd of November, 2021. Such approach was made in the month of January, 2022 and upon having searched the Advocate the certified copy of the impugned order was applied on 20th January, 2022. Interestingly, it is further stated that all the pleadings filed in connection with the said proceeding were handed over to them on 15th February, 2022 which, according to the petitioner, was not a complete set as further additional documents were handed over between the period from 25th of February, 2022 to 9th March, 2022. It is further stated that immediately upon receiving all the pleadings, the conference was held with the Senior Advocate of this Court who advised the appellant to prefer an appeal against the impugned order. All the relevant papers were forwarded by the said Counsel engaged by the petitioner on 12.4.1011 which reached the office of the petitioner after a gap of one month. Since there were holidays from 13th May, 2022 to 15th May, 2022, steps could not be taken until 16th May, 2022 when those documents were sent for notarization. The notarized documents were received back by the petitioner on 24th May, 2022 and thereafter a month's time was consumed for apostylisation through the Ministry of Law & Justice of the Foreign Affairs and the High Commission of India. Ultimately, the documents were forwarded through courier to the said learned Advocate on 16.6.22 which was duly received on 1st July, 2022. Since the time consumed for the aforesaid exercise invites the application of the Limitation Act, further application for condonation of delay was forwarded upon completing all the formalities and reached in the last week of July, 2022 and the appeal came to be filed on 2nd August, 2022.

Such being the stand of the appellant as summarized evinced that although being aware of the orders passed on 7th of May, 2021 and 15th of June, 2021, yet they did not feel that it would affect their rights and a shelter is sought to be taken that the counter part i.e. the respondent no. 3 herein was requested to take steps for vacation of the interim order and, therefore, believing so, no steps were taken even after the final order is passed. There appears to be an inordinate delay in filing the instant appeal and the reasons have been succinctly narrated hereinabove. It can be presumed that so far as the order dated 7th of May, 2021 is concerned since it bore different bank guarantee numbers, the appellant may not feel aggrieved thereby, but the situation took a dramatically opposite turn where the clarified order was passed on 15th June, 2021 affecting the right of the appellant/petitioner and percolating a sense that the said restraint order includes the said bank guarantee. Invocation has been interdicted. Every order passed in the said proceeding was communicated to the appellant/petitioner and respondent no. 3 which would be evident from the swift message thereto indicating that such order has prevented the invocation of the bank guarantee.

Interestingly, the aforesaid communication reveals that the insistence was made by the appellant/petitioner to release the bank guarantee as the invocation has been made by the respondent no. 2 herein on 5th of May, 2021. Surprisingly, even being aware of the interim orders passed in the proceeding, the money was disbursed to the respondent no. 2 in the later part of the month of june, 2021. The appellant being aware and conscious of the interim order yet disbursed the amount and by filing the instant appeal sought to invoke the bank guarantee issued by the respondent no. 3 despite the fact that the invocation and/or disbursement was in violation of the orders passed by this Court in the said proceedings. The reason for recording the aforesaid fact is because of the enlightening observations made in the above noted reports wherein the Apex Court has held that the Court while exercising the discretion must also bear in mind the rights accrued to the other side. The equity is not one way traffic. It has to be applied not only in accordance with the provisions of the law and to render justice but also taking into account the conduct of the parties and the prejudices and the affectation of the rights of the respective parties. The equitable doctrine should not be applied in an abstract manner but to be applied on a legal maxim ex debito justitiae.

As indicated above, the appellant/petitioner was aware of the orders dated 7th of May, 2021 and 15th of June, 2021, yet it did not take any steps at least against an order dated 15th June, 2021 when the Court replaced the numbers of the bank guarantees appearing in the order dated 7th of May, 2021. If the right of a person or a party is affected, it is inconceivable that such a person or a party would entrust the task of remedying and/or putting the clock back through another party and keeping silent for a considerable period of time. Even the final order dated 23rd November, 2021 was duly communicated on 25th November, 2021 by the respondent no. 3 through an email, yet the appellant/petitioner took more than two months to find out the Counsel/Advocate of this Court to pursue his remedy provided under the statute. If the story of the appellant that the respondent no. 3 was requested to take steps for vacation of the said interim order is supposedly true, yet it is inconceivable that all the documents and/or pleadings could only be handed over to them in the month of February, 2021 upto the first week of March, 2022. The conference was held in the month of March, 2022 with the Senior Advocate and all the papers could for the first time be forwarded to the appellant on 12.4.2022 which reached after a gap of one month. Interestingly, on the date of the consultation and the steps being taken, the period of limitation intervened and it is unimaginable that the Counsel of repute whom the appellant/petitioner had engaged will not forward an application for condonation of delay along with the other relevant documents. The conduct of the appellant does not remotely suggest their bona fide nor it can be said that they are not free from any blame or no negligence and/or carelessness can be attributed to their conduct. Rather it is manifest from the above conduct that they were watching the proceedings from the fence and the moment they realized that the respondent no. 3 has decided not to pursue any further, took the baton and sought to achieve something which could not be achieved directly. The statements made in the said application do not appear to be sufficient for the expression "sufficient cause" and, therefore, we do not find that the Court should exercise a discretion in condoning the delay.

Affidavit-in-reply filed in Court today be kept on record.

The application for condonation of delay is dismissed.

There shall be no order as to costs.

(HARISH TANDON, J.)

(PRASENJIT BISWAS, J.)

kc/s.chandra