

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO.222 OF 2019

IN

FEMA (L) NO.25319 OF 2019

The Special Director, Enforcement Directorate
Mumbai

...Applicant

In the matter Between

The Special Director, Enforcement Directorate
Mumbai

...Appellant

Versus

Mr. Ashok Jain

...Respondent

Mr. H.S.Venegavkar with Mr. Aayush Kedia for
Applicant/Appellant.

Mr. Rahul Hakani with Ms. Shreya Gosavi with Ms. Rhea Verma
with Mr. Vishesh Shrivastava with Mr. Rajiv Jain for Respondent.

CORAM: K. R. SHRIRAM &
NEELA GOKHALE, JJ.

DATED: 18th October 2023

PC:-

1. Mr. Hakani, at the outset, states that that he shall file vakalatnama within a period of one week from today under advice to Mr. Venegavkar. Statement accepted as Undertaking to this Court.

2. This Interim Application is to condone delay of 54 days in filing the Appeal under Section 35 of the Foreign Exchange Management Act, 1999 ("**FEMA**"). Section 35 of the FEMA provides that any person aggrieved by any decision or order of the Appellate Tribunal may file

an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days. According to Applicant, the delay of 54 days is within the extendable period of 60 days.

3. Mr. Hakani states of course that the delay should be 58 days and not 54 days. Mr. Hakani strongly opposed the application and submitted that the explanation given cannot be termed as satisfactory.

4. On the directions of the Court, as recorded in the order dated 4th October 2023, applicant has filed a further additional affidavit through one Arun Pratap Singh, Assistant Director, Directorate of Enforcement, affirmed on 10th October 2023 in which the reason for 54 days delay has been explained with dates. Of course affiant also states that applicant being a Central Agency is subject to several procedures and compliances and hence, the delay be condoned.

5. Though we are inclined to condone this delay, it would be useful for applicant in all the matters to be aware of the law as it stands. Paragraphs 5 to 8 of the order passed by this Court on 10th

January 2023 in Interim Application No.604 of 2020 in Appeal (St)
 No.29 of 2020 in ***Municipal Corporation of Greater Mumbai v. Mahendra Builders and Ors.*** reads as under:

"5 The next point that appears from the affidavit of applicant is that the delay was due to departmental/administrative procedures. The Apex Court in the case of ***Post Master General And Others Vs. Living Media India Limited And Another***¹, was considering an application to condone delay of about 427 days. In that application also the applicant, i.e., a Postal Department had given reasons for the delay and one of the reason was that the delay was not intentional, but, was on account of the departmental/administrative procedure involved in filing the Petition for special leave. It was also submitted that unlike the private litigation, matters relating to the Government are required to be considered at various levels and then only a decision is taken. For the said reasons, the delay caused in filing the Petition was a result of all necessary and unavoidable office formalities and was bonafide and not deliberate or intentional. The Apex Court held that the law of limitation binds everybody equally including Government and defence by Government of impersonal machinery and inherited bureaucratic methodology cannot accepted in view of modern technology being used and available. Absence of diligence cannot be a reason to condone delay as condonation of delay is an exception and should not be used as an anticipated benefit for Government Department. The Court also held that usual explanation that file was kept pending due to procedural red tape, cannot be accepted.

6 Paragraphs 22, 26 to 29, read as under:

"22. *In CWT vs. Amateur Riders Club*, there was a delay of 264 days in filing the SLP by the Commissioner of Wealth Tax, Bombay. The explanation for the delay had been set out in the petitioner's own words as under: (SCC p. 604, para 2)

"2. ...(g) The Advocate-on-Record got the special leave petition drafted from the drafting Advocate and sent the same for approval to the Board on 24-6-1993 along with the case file.

(h) The Board returned the case file to the Advocate-on-Record on 9-7-1993 who re-sent the same to the Board on 20-9-1993 requesting that draft SLP was not approved by the Board. The Board after approving the draft SLP sent this file to CAS on 1-10-1993."

After incorporating the above explanation, this Court refused to condone the delay by observing thus: (SCC p.

1 2012(3)SCC 556

604, para 3)

"3. Having regard to the law of limitation which binds everybody, we cannot find any way of granting relief. It is true that Government should not be treated as any other private litigant as, indeed, in the case of the former the decisions to present and prosecute appeals are not individual but are institutional decisions necessarily bogged down by the proverbial red tape. But there are limits to this also. Even with all this latitude, the explanation offered for the delay in this case merely serves to aggravate the attitude of indifference of the Revenue in protecting its common interests. The affidavit is again one of the stereotyped affidavits making it susceptible to the criticism that the Revenue does not seem to attach any importance to the need for promptitude even where it affects its own interest.

[emphasis supplied]

26. In spite of affording another opportunity to file better affidavit by placing adequate material, neither the Department nor the person-in-charge has filed any explanation for not applying the certified copy within the prescribed period. The other dates mentioned in the affidavit which we have already extracted, clearly show that there was delay at every stage and except mentioning the dates of receipt of the file and the decision taken, there is no explanation as to why such delay had occasioned. Though it was stated by the Department that the delay was due to unavoidable circumstances and genuine difficulties, the fact remains that from day one the Department or the person/persons concerned have not evinced diligence in prosecuting the matter to this Court by taking appropriate steps.

27. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take

advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody, including the Government.

29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.”

7 Post Master General (Supra) came to be considered once again by the Apex Court in **State of Uttar Pradesh and Ors. Vs. Sabha Narain and Ors.**², where paragraph 3 reads as under:

“3. We have repeatedly discouraged State Governments and public authorities in adopting an approach that they can walk in to the Supreme Court as and when they please ignoring the period of limitation prescribed by the statutes, as if the Limitation statute does not apply to them. In this behalf, suffice to refer to our judgments in the State of M.P. v. Bherulal and State of Odisha v. Sunanda Mahakuda. The leeway which was given to the Government/public authorities on account of innate inefficiencies was the result of certain orders of this Court which came at a time when technology had not advanced and thus, greater indulgence was shown. This position is no more prevalent and the current legal position has been elucidated by the judgment of this Court in Postmaster General v. Living Media India Ltd. Despite this, there seems to be little change in the approach of the Government and public authorities.”

(Emphasis supplied)

8 Therefore one thing is clear from the law as laid down by the Apex Court is that the defence of bureaucratic methodology cannot be and should not be accepted by the Courts and when there is absence of diligence by department in prosecuting a matter, delay cannot be condoned. It is also clear that the condonation of delay is an exception and should not be used as an anticipated benefit for Government

department by offering usual explanation that file was kept pending due to procedural red tape. In the present case, apart from the incorrect statement as recorded earlier by us there is also bureaucratic indifference. There is no proper explanation for not filing the Appeal on time."

6. Courts have held that the defence of bureaucratic methodology cannot be and should not be accepted by the Courts and when there is absence of diligence by department in prosecuting a matter, delay should not be condoned.

7. It will also be apposite to re-produce paragraph 7 of the judgment of the Hon'ble Apex Court in the State of **Madhya Pradesh & Ors. v. Bherulal**³. It reads as under:

"7. We are thus, constrained to send a signal and we propose to do in all matters today, where there are such inordinate delays that the Government or State authorities coming before us must pay for wastage of judicial time which has its own value. Such costs can be recovered from the officers responsible."

8. Of-course, in this case, we are satisfied with the explanation given in the application as well as additional affidavit that applicant was prevented by 'sufficient cause' from filing appeal within the said period of extendable 60 days. In the circumstances, delay condoned.

9. Application disposed.

(NEELA GOKHALE, J.)

(K. R. SHRIRAM, J.)