



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 5995 OF 2019

M/s. B.J. Construction,
Through its Proprietor,
Bhaskar S/o. Anandrao Rasekar,
Aged about 66 years, Occupation:
Business, Resident of Deonagar,
Dhangarpura, Nagpur.

.... **PETITIONER.**

// VERSUS //

1. Mohd. Arif S/o Abdul Shakur,
Aged about Major, Occupation :
Business, Resident of Ganjakhet,
Nagpur.
2. Pratibha Wd/o Keith Albert
(Since deceased, through her
legal representatives)
 - a. Parikshit S/o Keith Albert,
Aged about 33 years, Occ. Business
 - b. Dushyant S/o Keith Albert,
Aged about Major, Occupation :
Not Known.
 - c. Tejasvini D/o Keith Albert,
Aged about Major, Occupation:
Not known

All Respondent Nos. 2(a) to 2(c)
Residents of 59, K.T.Nagar, Katol
Road, Nagpur.

3. Smt. Santoshkumari Wd/o Dindayal Deshraj
Aged about Major, Occupation :
Household.
4. Padmavati D/o Dindayal Deshraj,
Aged about Major, Occupation : Service,
5. Ragini D/o Dindayal Deshraj
Aged about Major, Occupation : Service,
6. Minakshi D/o Dindayal Deshraj,
Aged about Major, Occupation : Service,
7. Aruna D/o Dindayal Deshraj
Aged about Major, Occupation : Service,
8. Anupama D/o Dindayal Deshraj,
Aged about Major, Occupation : Service,

All Respondent Nos. 3 to 8 residents of
Gandhi Chowk, Sadar, Nagpur

9. C.V.Kale, Hon'ble Arbitrator,
Aged Major, Occupation : Advocate,
Resident of 47, Ambazari Layout,
Nagpur

.... **RESPONDENTS.**

Shri Anand Jaiswal, Sr. Advocate a/b Ms Radhika Bajaj & Shri N.G.Moharir,
Advocates for Petitioner.

Shri N.H.Shams, Advocate for Respondent No.1.

Shri R.S.Sundaram, Advocate for the Respondent Nos.2(a) to 2(c)

Shri R.M.Bhangde, Advocate for Respondent Nos. 3 to 8.

CORAM : ANIL S. KILOR, J.

DATE OF RESERVING THE JUDGMENT : 07/09/2023

DATE OF PRONOUNCING THE JUDGMENT: 29/11/2023

JUDGMENT :

1. Heard.

2. **RULE.** Rule made returnable forthwith. Heard finally by consent of the parties.

3. In the present writ petition the order dated 08/07/2019 passed below Exh.1 by the Principal District and Sessions Judge, Nagpur in Civil M.A. No.49/2014, rejecting the application for condonation of delay in filing restoration application, is under challenge.

The brief facts of the present case are as under :

4. The petitioner entered into an agreement to sell and development with the respondent Nos.1 and 2. In view of a dispute arose between the parties, the matter was referred to the Sole Arbitrator, who passed an award in favour of the respondent Nos. 1 and 2 on 10/06/2003.

5. The said award was the subject matter of challenge in the application filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Arbitration Act”) before the Principal District Judge, Nagpur.

6. The learned Principal District Judge dismissed the said application for want of prosecution on 01/01/2013.

7. The petitioner, on getting the knowledge about dismissal of the application, filed an application for restoration along with application for condonation of delay in filing application for restoration. There was a delay of 563 days, which was allowed by the learned Principal District Judge vide order dated 18/08/2016. However, in Civil Revision Application No. 116 of 2017 it was set aside by this Court and remanded the matter back to the learned Principal District Judge for deciding the same afresh.

8. On remand, the learned Principal District Judge passed the impugned order dated 08/07/2019 rejecting the application. Hence, this writ petition.

9. After going through the record, it is evident that the application under Section 34 of the Arbitration Act was filed by the petitioner on 30/06/2003.

10. The petitioner on 07/08/2004 filed the Written Notes of Argument and thereafter having found that the matter was being adjourned from time to time, he filed a Pursis on 27/02/2008 requesting the Court to treat the matter as heard in view of the Written Notes of Argument and decide the same at the earliest.

11. Despite the Written Notes of Argument on record and the pursis saying that 'treat the matter as heard' the learned Principal District Judge dismissed the application on 01/01/2013 observing that no one turned to argue the matter.

12. From the order dated 01/01/2013 it appears that the learned Principal District Judge failed to note the above referred fact as regards the filing of Written Notes of Argument and Pursis by the petitioner and wrongly considered that the petitioner is not interested to prosecute the application and dismissed the application for want of prosecution.

13. The petitioner, thereafter, applied for restoration and since there was a delay, an application for condonation of delay was filed praying to condone 563 days' delay. The explanation for such delay was given in para 4, 5 and 8 of the application, which reads thus:

“4. That, the applicant was under an impression that the said matter will disposed off at the earliest as he has filed his written notes of argument on record. The applicant has regularly visited the matter upto the year 2011 but, having an old age and having the health issues, he was unable to remain present in the last months of the year, 2012. The applicant, as he was suffering for the health issues he was in telephonic contact with his counsel and every time he received the communication from his counsel that as the present M.C.A. No. 360/2003 was tagged with the M.C.A. No. 540/2003 and as the stay in M.C.A. No.540/2003 is operating the matter is adjourned. The applicant was not aware of the fact that the matter was dismissed in default for want of prosecution. The applicant has appeared in the H’ble Court in his matters, only after the request of his counsel from the year 2012, due to his old age and his health issues.

5. That, the applicant submits that as he was getting the same communication from his counsel he visited to the office of his counsel in the month of April, 2014 and asked about the status of the matter. At that time the applicant came to know that the counsel is not able to tell the status of the present matter and hence he tried to trace out the present matter. On that occasion, he came to know that the matter was dismissed in default for want of prosecution on 01.01.2013. The applicant immediately visited to the office of the counsel and told him the said fact and the counsel asked to take out the certified copy of the order dated 01.01.2013. The applicant receives those copies on the last days of May, 2014. The counsel after going through the copies asked the applicant to take out the copies of rojanama and hence the applicant has again applied for taking the copies of rojanma in the month of June, 2014. The applicant received the copies of the entire rojnama in the same month and the applicant handed over the copies to the counsel. And from that the time the applicant was regularly in the contact with his counsel. As after so many request to the counsel, the counsel failed to file the application for restoration the applicant

withdrawn the matter from his counsel in the last week of July, 2014.

6. ...

7. ...

8. The applicant submits that there is no fault on his part as he has filed the written notes of argument on record along with the pursis mentioning that the present matter may be treated as heard and may be disposed off at the earliest. But, instead of disposing of the matter the matter was dismissed in default. The H'ble Court without perusing the record passed the order mechanically and arbitrarily. Hence the applicant has filed the application for restoration immediately after the knowledge about the order of dismissal of matter in default on 01/01/2013."

14. Thus, the question involved in the present writ petition is that whether the learned Principal District Judge is right in dismissing the application for condonation of delay. In the circumstances, it would be beneficial to reiterate the law on condonation of delay. The Hon'ble Supreme Court of India in the case of *Esha Bhattacharjee..vs.. Rathunathpur Nafar Academy*, reported in **(2013) 12 SCC 649**, has held thus:

"21. From the aforesaid authorities the principles that can 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 encapsule 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.

21.11.(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

21.12. (xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on

objective reasoning and not on individual perception.

21.13. (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

22. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are: -

22.1.(a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

22.2.(b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

22.3. (c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

22.4.(d) The increasing tendency to perceive delay as a non- serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters.”
(emphasis supplied)

15. In the teeth of above referred observations made by the Hon’ble Supreme Court of India, I would revert back to the facts of the present case.

16. The learned Principal District Judge while dismissing the application for condonation of delay has recorded the finding as under:

“17. Thus, considering all above discussion, it appears that no doubt, both the parties have filed written notes of arguments before the learned court prior to 2008. However, subsequently the matter was proceeded further and circumstances changed. It is to be noted that during the pendency of the application, the original non-applicant No.2 was expired on 24/01/2011. However, till the disposal of the matter, the applicant had not taken any step for bringing her LR's on record. So also, the reason mentioned in the application that he was ill or suffering for health issues, is not supported with the medical certificate or any document to that regard. So also, nature of illness is not specifically stated. Secondly, he has not made any allegation against the advocate for his default nor alleged that due to lapses on his part order is passed or that there was a communication gap between him and his advocate. The name of the advocate is also not mentioned. Thus, it appears that the application is vague. On the contrary, the status of the matter is available on the CIS and the applicant could see the status of his matter from the system very well, instead of blaming his advocate.”

17. In the application filed under Section 34(1) of the Arbitration Act filed by the petitioner there were nine non-applicants. It appears from the order impugned that the non-applicant No.2 was expired on 24/01/2011 and no steps were taken by the petitioners to bring LR's of non-applicant No.2 on record. However, that does not give reason for the Court to dismiss the application. The Court could have dismissed the application under Section 34 of the Arbitration Act against the non-applicant No.2. But in any case, the order of dismissal of application, as a whole for want of prosecution, for such reason is not

justifiable and therefore, I have no hesitation to hold that the learned Principal District Judge has committed an error in giving much emphasis on the fact that after the death of non-applicant No.2 on 24/01/2011 no steps were taken to bring his LR's on record.

18. Another ground that the Court did not find the ground of illness as sufficient for the reason that no medical certificate or any document was filed on record or the petitioner did not mention the nature of illness.

19. From the record, it is evident that on the date of filing of the application for condonation of delay the age of the petitioner was about 63 years.

20. Moreover, it is further evident that though the written notes of argument were filed in 2004 and thereafter a pursis in 2008 requesting the Court to treat that the matter as heard in view of the written notes of argument, it was not decided by the Court and on 01/01/2013 it was dismissed for want of prosecution.

21. Thus, it is evident that after filing written notes of argument the Court has not taken it into consideration the written notes of

argument for almost nine years and ignoring the same and holding that the petitioner failed to argue the matter, dismissed the application.

22. In the circumstances, for ends of justice the learned Principal District Judge ought to have taken lenient view while condoning the delay instead of going into the technicalities asking for medical certificate and disclosure of nature of ailment.

23. Having observed so, I am of the view that the learned trial Court has committed error in rejecting the application for condonation of delay. Accordingly, I pass the following order:

- i) The writ petition is allowed.
- ii) The order dated 08/07/2019 passed below Exh.1 by the Principal District Judge, Nagpur in Civil M.A. No.492 of 2014 is hereby quashed and set aside and consequently the application for condonation of delay in filing restoration application is allowed.

Rule is made absolute accordingly. No order as to costs.

(ANIL S. KILOR, J)