In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Partha Sarathi Sen

F.A.T. No.33 of 2024
IA No: CAN 1 of 2024
CAN 2 of 2024

Baxter (India) Private Limited
Vs.
Smt. Debjani Bose

For the appellant	:	Mr. Aniruddha Chatterjee, Mr. Zeeshan Haque, Mr. Pratik Shanu
For the respondent	:	Mr. S.P. Mukherjee, Mr. Subhojit Bose, Mr. Prithish Chandra
Hearing concluded on	:	12.12.2024
Judgment on	:	16.12.2024

Sabyasachi Bhattacharyya, J.:-

In RE: CAN 1 of 2024

1. The appellant has filed the present application for condonation of delay of 5347 days (just more than 14 ½ years) in filing the present appeal.

2. The respondent instituted Money Suit No.9 of 2002 against the appellant and obtained an *ex parte* decree on June 20, 2009. The appellant initially contested the suit by filing a written statement but was absent on the date of passing of the *ex parte* decree.

3. An execution case was filed on June 8, 2021, within the limitation period, and notice of the execution case was served on the defendant/appellant in the month of October, 2022.

4. Learned senior counsel appearing for the appellant contends that the appellant-Company has its registered office in Delhi, whereas the suit was instituted in Kolkata. The appellant had engaged the services of a local advocate and one Supriyo Sen Sharma, an employee of the appellant-Company, to conduct the case and to update the then existing management of the appellant-Company with all facts and information relating to the suit till October 17, 2005. Thereafter the said Supriyo Sen Sharma left the appellant-Company. According to the appellant, despite the appellant having sought for all information and documents relating to the area of work of the said ex-employee, the latter did not discharge such duty.

5. Thus, the appellant allegedly lost track of the matter and was unaware of the proceedings till notice of the execution case was served in its Delhi office in the month of October, 2022.

6. The learned Senior Advocate appearing for the appellant cites a Division Bench judgment of this Court in *State of W.B. Vs. Biswanath Bhattacharya*, reported at *2012(5) CHN (CAL) 308*, in support of the proposition that if there is *prima facie* merit for adjudication in the appeal and there was an *ex parte* order, an application for condonation of delay in filing the same should be allowed in order to decide the issue on merit.

7. The learned Senior Advocate appearing for the appellant relies on *N. Balakrishnan vs. M. Krishnamurthy*, reported at *(1998) 7 SCC 123*, where it was held by the Supreme Court that length of delay is no matter; acceptability of the explanation is the only criteria. Rules of limitation, it was held, are not meant to destroy the rights of parties and the time-limit fixed for approaching the court is not because on the expiry of such time a bad cause would transform into a good cause. Unless *mala fides* can be attributed to the applicant as a part of a dilatory strategy or there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, the court should lean in favour of allowing condonation application.

8. The appellant next cites *M.K. Prasad vs. P. Arumugam*, reported at *(2001) 6 SCC 176*, for the proposition that even though the appellant appears not to be as vigilant as he ought to have been, if his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant, despite the fact that he should have been more vigilant, his failure to adopt such extra vigilance should not be made a ground for ousting him from litigation. While deciding an application for setting aside an *ex parte* decree, the court should keep in mind the judgment impugned, the extent of the property involved and the stake of the parties.

9. The learned Senior Advocate for the appellant submits that the appellant has a strong merit in the appeal, since no evidence to substantiate loss of goodwill or to justify the money decree was adduced or considered while passing the impugned *ex parte* decree.

10. Learned senior counsel next cites *Ram Nath Sao alias Ram Nath Sahu and others vs. Gobardhan Sao and others*, reported at *(2002) 3 SCC 195*, where the Supreme Court held *inter alia* that the expression “sufficient cause” within the meaning of Section 5 should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. Explanation for delay should not be rejected by taking a pedantic and hyper technical view of the matter when stakes are high and/or arguable points of facts and law are involved in the case.

11. The appellant next places reliance on *Sesh Nath Singh and another vs. Baidyabati Sheoraphuli Co-operative Bank Limited and another*, reported at *(2021) 7 SCC 313*, where the Supreme Court held, inter alia, that in order to condone delay, no formal application for such purpose need be filed, if a cause for not making the application is made out.

12. Learned senior counsel for the appellant thereafter places reliance on *O.P. Kathpalia vs. Lakhmir Singh (Dead) and others*, reported at *(1984) 4 SCC 66*, where the Supreme Court set aside an order refusing to condone delay, where there was gross miscarriage of justice.

13. The appellant next relies on *Aakash Lavlsesh Leisure Private Limited vs. Income Tax Officer 9(1)(1)*, reported at *(2020) 17 SCC 417*, where it was held that if sufficient cause was shown for condonation of delay, the same should be accepted by the court.

14. Learned senior counsel for the respondent controverts the submissions of the appellant and submits that the materials annexed to the pleadings, particularly in the supplementary affidavit and affidavit-in-opposition filed by the respondent, go on to show that the appellant had entered appearance in the suit long after 2005, till as late as January, 2009, five months prior to the *ex parte* decree being passed. Thus, the allegation that after the appellant's employee Shri Sen Sharma having left service, it lost track of the matter, is belied by the materials on record.

15. Learned senior counsel argues that Shri Ajoy Jain, one of the Directors of the appellant-Company, as borne out by the annexures to the respondent's pleadings herein, executed Vakalatnama on behalf of the Company to its advocates. Shri P.D. Himmatsingka, an advocate, was acting for the appellant and had communicated with the learned advocate-on-record for the appellant in the Trial Court. The said Shri P.D. Himmatsinka was also the advocate in a suit filed by a sister concern of the appellant and had, in the said communication, had intimated the learned advocate for the appellant that the present money suit was a backlash of the other suit filed by the said sister concern. Thus, all along, the appellant-Company was in the know of the pendency of the suit and had appeared on several dates therein.

16. Learned senior counsel takes the court through the various documents annexed to the pleadings of the respondent to substantiate such allegations.

17. It is only in paragraph no.6 of the affidavit-in-opposition to the supplementary affidavit that the appellant, for the first time, has claimed that it was not aware of the acts of its advocates. It is contended that no such plea was taken in the original Section 5 application but grew wiser after the continuous appearance of the appellant-Company through counsel in the suit after 2005 having been exposed in the affidavit-in-opposition and supplementary affidavit of the respondent. Moreover, such plea is not credible, since no advocate would be conducting litigation for a company without fees or instructions to so appear for long four years, between 2005 and 2009.

18. By placing reliance on Page No.15 of the affidavit-in-reply of the appellant in connection with the Section 5 application, learned senior counsel for the respondent points out that admittedly the appellant-Company had an office in Kolkata. Hence, the allegation that it had its office only in Delhi and could not take information of the case, pending in Kolkata, is false.

19. It is argued that evidence was led by the plaintiff for three days and 23 documents were marked as exhibits. As such, the contention of the appellant that it has a strong case on merits is also erroneous.

20. Learned senior counsel for the respondent cites a judgment passed by a Division Bench of the Bombay High Court in the matter of *Vama Apparels (India) Pvt. Ltd. vs. ACIT Central Circle 42*, where the Division Bench held that the reliance of the condonation applicant therein on a part-time employee who had left the company could not be a valid ground for condonation of delay. The said order was affirmed by the Supreme Court on April 22, 2019.

21. That apart, the respondent relies on *Pathapati Subba Reddy (Died) By L.Rs and others vs. Special Deputy Collector (LA)*, reported at *2024 SCC OnLine SC 513*, where the Supreme Court, *inter alia*, held that the law of limitation is based on public policy and there should be an end to litigation by forfeiting the right to remedy rather than the right itself. Courts are empowered to exercise discretion to condone delay if sufficient cause has been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as inordinate delay, negligence and want of due diligence. It was further held that merits of the case are not required to be considered in condoning the delay and that justice-oriented and liberal approach cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act.

22. Learned senior counsel for the respondent then cites *Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and Others*, reported at *(2013) 12 SCC 649*, where it was held by the Supreme Court that gross negligence on the part of counsel or litigant is to be taken note of before condoning delay and lack of *bona fides* imputable to a party seeking condonation is a significant and relevant fact. The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play. There is distinction between inordinate delay, where the court has to be strict, and a delay of short duration where the court can be lenient.

23. Learned senior counsel also relies on *Union of India and another vs. Jahangir Byramji Jeejeebhoy(D) Through His Lr.*, reported at *2024 SCC OnLine SC 489*, where it was held by the Supreme Court, by relying on *Esha Bhattacharjee (supra)* that if the applicant was not diligent, condonation of delay should not be permitted.

24. Learned senior counsel next cites two unreported judgments of the Supreme Court in the matters of *State of Madhya Pradesh vs. Ramkumar Choudhary [SLP (C) Diary No.48636 of 2024]* and *Rajneesh Kumar & Anr. vs. Ved Prakash [SLP (Civil) Nos.935-936 of 2021]* for the same proposition.

25. Lastly, learned senior counsel cites *Salil Dutta vs. T.M. and M.C. Private Ltd.*, reported at *(1993) 2 SCC 185*, where it was observed that the advocate is the agent of party and his acts and statements made within the limits of authority given to him are the acts and statements of the principal, that is, the party who engaged him.

26. Hence, it is argued that the appellant in the case at hand cannot disown the acts of its advocates in the court below which go on to show that the appellant was represented in the suit much after the year 2005.

27. Upon a careful consideration of the arguments of the parties and the materials on record, we find that the primary plinth of the appellant's application for condonation of delay is that after its employee namely one Supriyo Sen Sharma left the appellant-Company in the year 2005, it lost track of the matter. According to the appellant, it was the said Supriyo who used to conduct the litigation solely on behalf of the appellant.

28. However, such reliance of the appellant on one particular employee, who has since left the company and cannot be heard by the court, is merely a matter of convenience, in order to bypass its responsibility to look after its own litigation. Ample documents have been produced by the respondent to belie such contention.

29. The entire order-sheet of the money suit, annexed to the supplementary affidavit and affidavit-in-opposition of the respondent, go on to show that the appellant was represented by counsel and several applications were filed on behalf of the appellant in Money Suit No. 9 of 2002 much after the said Supriyo allegedly left the Company in the year 2005, till as late as the month of January, 2009. Hence, the said plea of sole reliance on Supriyo and lack of knowledge on the part of the appellant about the suit after 2005 is a palpable falsehood, intended to mislead the court. The records do not lie and unerringly point towards the appellant having been represented consistently in the suit by advocates throughout pendency of the suit at different points of time.

30. During arguments, learned counsel for the appellant has sought to insinuate that the said advocates' names were not recorded in the orders and there is no proof that they were empowered by the appellant to appear on its behalf.

31. Such argument is absurd. It is the well-known practice in District Courts, at least in West Bengal, that names of advocates are not recorded in each and every innocuous order but only in final judgments passed in suits and original proceedings. That apart, it is not credible even to the most gullible that different advocates would act for a company for as long as four years (2005 to 2009) without any specific instruction being given by the appellant and/or remuneration being paid for appearance in the suit. It is evident that the appellant is in the habit of levelling reckless allegations at anybody, be it employee or advocate, who comes in the way of the appellant to save its skin. Not content with casting unsubstantiated aspersions on its employee Supriyo Sen Sharma conveniently after he left service long back in 2005, the appellant now seeks to cast aspersions on all its advocates who appeared between 2005 and 2009 merely to get the benefit of condonation of delay in the present appeal. Such conduct on the part of the appellant is not only deplorable but is clearly *mala fide* and mischievous.

32. The appellant clearly suppressed having knowledge of the suit and having appeared in the same long after October 17, 2005, when the said Supriyo Sen Sharma stopped communicating according to the appellant.

33. It is also not credible as to why no steps whatsoever were taken by the appellant-Company when the said ex-employee refused to hand over documents and information regarding to the suit, and even for the long period of 19 years thereafter.

34. Definitely, the appellant would derive benefit of not preferring an appeal for so long, since the moment an appeal is preferred against a money decree, the same does not operate automatically as stay of the decree and if a stay application is moved, it is the established practice of courts in India to impose, as condition of such stay, deposit of security equivalent to the decretal amount. It cannot be mere coincidence that only after the filing of the execution case the appellant grew wiser and preferred the appeal. Obviously, the appellant extracted benefit of non-filing of any execution case for about 11 ½ years by the respondent, and only thereafter preferring the appeal when no option was left but to do so, to avoid suffering the decree by paying the decretal amount along with interest for the prolonged period of over 14 years.

35. We find that one Ms. Sucharita Mukhopadhyay had appeared as learned advocate for the appellant-Company in the money suit. One Ajoy Jain had handed over Vakalatnama to her, which is evident from Page No. 9 of the supplementary affidavit filed by the respondent in connection with the Section 5 application.

36. Again, on November 10, 2008, one P.D. Himmatsingka wrote a letter to Ms. Sucharita Maji, advocate for the appellant, indicating that Money

Suit No. 9 of 2002 was a backlash of another suit filed by a sister concern of the appellant-Company. Notably, in the Vakalatnama received on August 28, 2002 by the said learned advocate, who was then Sucharita Mukhopadhyay, the same signature as that on behalf of P.D. Himmatsingka in the letter dated November 10, 2008 appears along with Ms. Sucharita, indicating that the same person had jointly received the Vakalatnama with Ms. Sucharita.

37. We find from the records that the appellant-Company, in its affidavit-in-reply, has admitted that it has an office in Kolkata, which falsifies its consistent alibi that because it is a company based in Delhi, it could not take information of its Kolkata litigation.

38. As extracted from the judgments cited by both parties, the consistent view of the Supreme Court has been that although lenience is to be shown in favour of litigants in respect of condonation of delay, such lenience can only be exercised in favour of vigilant litigants. In *N. Balakrishnan (supra)*, the Supreme Court held that rules of limitation are meant to ensure that parties do not resort to dilatory tactics. Even in the said case, cited by the appellant, it was held that if the explanation does not smack of *mala fides* or is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. However, whenever there is reasonable ground to think that the delay was occasioned deliberately to gain time, the court should lean against acceptance of the explanation.

39. The vigilant conduct of the litigant has always been a consistent parameter for courts in assessing whether a liberal construction should be lent to the expression “sufficient cause” in Section 5 of the Limitation

Act. In *Sesh Nath Singh (supra)*, although the Supreme Court observed that a formal application for condonation of delay was not a *sine qua non* under Section 5 of the Limitation Act, the court may admit an application or appeal without an application if sufficient cause is made out. However, it was held that the court can always insist that an application or an affidavit showing cause for delay be filed. No applicant or appellant can claim condonation of delay under Section 5 of the Limitation as of right, without making an application, it was further observed.

40. In *O.P. Kathpalia (supra)*, the Supreme Court condoned the delay since otherwise there would be a gross miscarriage of justice, which is not the present case.

41. Consistently, the appellant has sought to cast aspersions on its advocates. However, in *Salil Dutta (supra)*, the Supreme Court categorically observed that the advocate is the agent of the party and his acts and statements made within the limits of authority are the acts and statements of the principal who engaged him.

42. In *Pathapati Subba Reddy (supra)*, upon considering its previous decisions, the Supreme Court laid down the law on condonation of delay. Paragraph No.26 of the said judgment is quoted hereinbelow in the above context:

> *"**26.** On a harmonious consideration of the provisions of the law, as aforesaid, and the law laid down by this Court, it is evident that:*
>
> *(i) Law of limitation is based upon public policy that there should be an end to litigation by forfeiting the right to remedy rather than the right itself;*
>
> *(ii) A right or the remedy that has not been exercised or availed of for a long time must come to an end or cease to exist after a fixed period of time;*
>
> *(iii) The provisions of the Limitation Act have to be construed differently, such as Section 3 has to be construed in a strict sense whereas Section 5 has to be construed liberally;*

(iv) In order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind but the same cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act;

(v) Courts are empowered to exercise discretion to condone the delay if sufficient cause had been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as, where there is inordinate delay, negligence and want of due diligence;

(vi) Merely some persons obtained relief in similar matter, it does not mean that others are also entitled to the same benefit if the court is not satisfied with the cause shown for the delay in filing the appeal;

(vii) Merits of the case are not required to be considered in condoning the delay; and

(viii) Delay condonation application has to be decided on the parameters laid down for condoning the delay and condoning the delay for the reason that the conditions have been imposed, tantamounts to disregarding the statutory provision."

43. In the said paragraph, the Supreme Court highlighted that justice-oriented approach and liberal approach in condonation of delay cannot be used to defeat the substantial law of limitation. Exercise of the power, it was observed, is discretionary and may not be exercised even if sufficient cause is established for various factors such as inordinate delay, negligence and want of due diligence.

44. Notably, two important deviations were made in *Pathapati Subba Reddy (supra)* from the previous line of judgments holding the field. The first, as opposed to the previous position that the length of delay is not material but the sufficiency of the cause is, the Supreme Court now held that the length of delay, if inordinate, would be a relevant consideration for refusing condonation of delay. Secondly, as opposed to the Division Bench of this Court in *State of W.B. Vs. Biswanath Bhattacharya (supra)*, it was held by the Supreme Court that merits of the case are not required to be considered in condoning the delay.

45. In the present case, the appellant was not only negligent and lacked due diligence, but no plausible explanation worth the name has been furnished for the utter inaction on the part of the appellant in choosing not to prefer an appeal despite, at all material times, having been represented in the suit by advocates till the beginning of 2009, in which year the *ex parte* decree was passed.

46. There is no explanation whatsoever as to why the appellant kept mum even when its alleged ex-employee did not disclose the information about the suit. We find from the records that the Directors of the Company had conferred power on its advocates to appear in the suit on behalf of the appellant-Company and were, thus, aware of the suit. Hence, there is no reason whatsoever as to why the management of the Company was utterly nonchalant in pursuing the litigation despite having full knowledge of the suit.

47. Thus, knowledge of the suit throughout the relevant period is squarely attributable to the appellant.

48. Accordingly, there cannot be any plausible reason as to why the appellant sat tight without preferring any appeal for the prolonged period of 14 ½ years even after the *ex parte* decree. Such delay is not only inordinate, the attempt on the part of the appellant-Company to cast baseless aspersions on its advocates who appeared after 2005 in the suit and also, conveniently, on an ex-employee who has left service long back in the year 2005 and obviously does not have an opportunity to defend himself is inexcusable.

49. Hence, patent *mala fides* can be attributed to the appellant-Company and its management, even apart from its gross negligence and inordinate delay in preferring the appeal.

50. As postulated by the Supreme Court in *Pathapati Subba Reddy (supra)* and *Esha Bhattacharjee (supra)*, a liberal and justice-oriented approach cannot be abused to defeat the substantial law of limitation. There is not a single reason why the discretionary relief of condonation of delay should be exercised in favour of the recalcitrant appellant in the present case.

51. In view of the above discussions, it is evident that the appellant attempted to mislead this Court by making incorrect and false allegations as to lack of knowledge of the suit after 2005. Also, considerable harassment has been caused to the respondent by preferring the present appeal and moving the present application for condonation of delay, thereby compelling the respondent to be embroiled in a hopelessly time-barred litigation.

52. The alleged delay on the part of the respondent/decree holder in levying the execution is totally irrelevant, since the execution case was filed within the limitation period whereas the present appeal has been presented over 14 ½ years after the expiry of the limitation period.

53. Thus, there arises no question of condoning the delay as prayed for herein. Hence, CAN 1 of 2023 is dismissed on contest. Consequentially, FAT No.33 of 2024 and CAN 2 of 2024 also stand dismissed.

54. Due to the *mala fide* attempt on the part of the appellant to mislead the Court and for the harassment caused by the appellant to the respondent, the appellant shall pay costs of Rs.1,00,000/- (Rupees One Lakh) to the respondent within December 31, 2024.

55. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Partha Sarathi Sen, J.)