



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.1135 OF 2023**

Hiren Ashwin Shah ... Petitioner
versus
State of Maharashtra and Anr. ... Respondents

Mr. Vinod S. Pandey with Ms. Nilima Sarvagod, for Petitioner.
Mr. S.R.Aagarkar, APP for State.
Mr. Yazad Maneck Udwadia, for Respondent No.2.

CORAM: N.J.JAMADAR, J.

DATE : 4 MARCH 2024

JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the parties, heard finally.
2. The Petitioner assails the legality, propriety and correctness of an order dated 20 December 2022, passed by the learned Additional Sessions Judge (Borivali Division), Mumbai in Criminal Revision Application No.63 of 2021, whereby the Revision preferred by the Petitioner came to be dismissed, affirming the order dated 22 January 2021, passed by the learned Metropolitan Magistrate, 43rd Court, Borivali, in CC 261/Misc/2020, condoning the delay of 1259 days in filing the complaint for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (the Act, 1881).
3. Shorn of unnecessary details, the background facts can be stated as

under :

3.1 For the sake of convenience and clarity, the parties are referred to in the capacity in which they are arrayed before the learned Magistrate.

3.2 The complainant-Respondent No.2 claimed to have rendered certain consultancy services to the accused-Petitioner, who runs M/s. Chetak Construction Company and other entities. The consultancy charges were overdue. A purported settlement was arrived at between the complainant and the accused. The accused had drawn cheques bearing Nos.411196 and 491942 dated 5 October 2016 and 22 December 2016 in the sum of Rs.10,00,000/- and Rs.11,50,000/- respectively, towards the full and final settlement of the claim of the complainant.

3.3 Both the cheques were, however, dishonoured on presentment. On 19 January 2017, the complainant addressed a demand notice calling upon the accused to pay the amount covered by the dishonoured cheques. The complainant asserts, the accused addressed a letter dated 1 March 2017 acknowledging the liability, and also assured to pay the due amount by 31 March 2017. In the event of default, the accused offered to pay interest @ Rs.30,000/- p.m. till the payment of the full amount. The accused requested the complainant not to further proceed with the notice under Section 138 of the Act.

3.4 The complainant asserts, the accused repetitively gave assurances and promises to pay the due amount. On 12 July 2019, a MOU was executed between the

parties, whereunder also the accused acknowledged the liability and assured to pay an amount of Rs.20 Lakhs in five installments during 20 July 2019 to 5 September 2019. As the accused committed default, despite giving promises, the complainant filed a complaint under Section 138 of the Act, on 20 August 2020 along with an application for condonation of delay of 1259 days in filing the complaint.

3.5 A notice was issued to the accused. After appraisal of the application, reply thereto and the documents on record, the learned Metropolitan Magistrate was persuaded to condone the delay in filing the complaint, holding that the repeated assurances and representations made by the accused dissuaded the complainant from filing the complaint within the statutory period of limitation and that the same constituted a sufficient cause for not filing the complaint within the period prescribed under clause (b) of Section 142 of the Act, 1881.

3.6 Being aggrieved, the accused preferred a revision before the Court of Session. By the impugned judgment and order, the learned Additional Sessions Judge found no reason to interfere with the discretion exercised by the learned Metropolitan Magistrate. It was, inter alia, held that the complainant had ascribed justifiable reasons for condonation of delay and those reasons were borne out by the documents executed by the parties and the correspondence exchanged between them.

3.7 Being further aggrieved, the accused has invoked the writ jurisdiction.

4. I have heard Mr. Vinod S. Pandey, learned Counsel for the Petitioner

and Mr. Yazad Udwadia, learned Counsel for Respondent No.2 at some length. With the assistance of the learned Counsel for the parties, I have also perused the pleadings and material on record.

5. Mr. Pandey took a slew of exceptions to the impugned orders. Firstly, it was submitted that the learned Additional Sessions Judge as well as the learned Metropolitan Magistrate lost sight of the fact that there was a huge delay of 1259 days, which was both inordinate and unexplained. Secondly, the courts also lost sight of the fact that the matter of condonation of delay arose in respect of a criminal prosecution. A liberal approach which may be justifiable in civil proceedings cannot be adopted in a prosecution for an offence under Section 138 of the Act, 1881, as penal consequences ensue. Thirdly, in the facts of the case, according to Mr. Pandey, the reasons ascribed by the complainant that on account of the assurances allegedly made by the accused, he did not lodge the complaint within the stipulated time, cannot be said to be factually sustainable and thus, cannot constitute sufficient cause for the condonation of delay.

6. Mr. Udwadia, learned Counsel for Respondent No.2 supported the impugned orders. It was urged that since the learned Magistrate as well as the learned Additional Sessions Judge have exercised discretion to condone the delay, this Court may not interfere with the impugned orders in exercise of its extra ordinary writ jurisdiction. Mr. Udwadia would further submit that once the court is empowered to

condone the delay, the submission that in case of a prosecution the court should adopt a different yardstick in the matter of condonation of delay cannot be accepted. Lastly, it was urged that it is not the length of the delay but the cause assigned for the delay which is of determinative significance.

7. In the case at hand, as the learned Magistrate has exercised discretion to condone the delay, and the cause assigned by the complainant was held to be sufficient, and the learned Sessions Judge found no reason to interfere with the exercise of the said discretion, there is no reason to interfere with the impugned orders, submitted Mr. Udwadia.

8. There is not much controversy on the factual score. A demand notice was addressed on 19 January 2017, within the period prescribed under clause (b) of the proviso to Section 138 of the Act, 1881. Indisputably, the complaint was not lodged within the period stipulated under Section 142(1)(b) of the Act, 1881 from the date of the accrual of the cause of action under clause (c) of the proviso to Section 138 of the Act, 1881. The fact that the accused had addressed a letter dated 1 March 2017 and a Memorandum of Understanding came to be executed between the parties on 12 July 2019, are also not much in contest, though the import of those documents and the circumstances in which they were executed may be put in contest.

9. Indeed, there is an exchange of correspondence and whatsapp messages between the parties which indicate that, even after the dishonour of the subject

cheques, the accused kept on repetitively assuring the complainant that the due amount would be paid.

10. The learned Magistrate was of the view that the aforesaid material constituted a sufficient cause as the accused had acknowledged the liability and even made some payment on 23 July 2019 and such conduct and payment on the part of the accused constituted a sufficient cause for not filing the complaint within the stipulated period. The learned Additional Sessions Judge found no fault with the aforesaid approach of the learned Magistrate.

11. First and foremost, the approach expected of this Court when the Courts below have exercised discretion positively; to condone the delay. The principles which govern the matter of condonation of delay in preferring the application/appeal are well recognized. It is not the length of delay, but the sufficiency of the cause that is of critical salience. If the cause ascribed by the party is found to be sufficient, the length of time pales in significance. It is also trite that the courts should adopt a liberal approach in considering the prayer for condonation of delay, as the adjudication of the matter on merits rather than on technicalities promotes the cause of justice. Ordinarily, courts lean in favour of condonation of delay, in the absence of willful negligence or want of bonafides. The prescription of period of limitation is, thus, not premised on the destroying rights of the parties but as a bar to the remedy, as an indefinite period to enforce such remedy is fraught with the consequence of

uncertainty and absence of finality to the prospect of litigation.

12. There is a subtle yet significant difference in the approach of the court when the court at the first instance has exercised its discretion to condone the delay and in cases where the application for condonation of delay is rejected by such court. In the former case, since the court below has exercised its discretion in a positive manner to condone the delay, ordinarily the superior court should not interfere with such a finding, as it has the potentiality to promote the cause of substantive justice. However, where the court at the first instance refuses to condone the delay, the superior court is at liberty to reassess the entire matter of condonation of delay and arrive at its own conclusion, *de hors* the conclusion arrived at by the court below.

13. A profitable reference in this context can be made to the oft-quoted decision of the Supreme Court in the case of N. Balakrishnan V/s. M. Krishnamurthy¹ wherein the difference in the approach was illuminatingly delineated.

The observations in paragraphs 9 to 13 are instructive and, thus, extracted below :

“9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient it is the result of positive exercise

1 (1998) 7 SCC 123

of discretion and normally the superior court should not disturb such finding, much less in reversional jurisdiction, unless the exercise of discretion was on whole untenable grounds or arbitrary or perverse. But it is a different matter when the first cut refuses to condone the delay. In such cases, the superior cut would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

10. The reason for such a different stance is thus:

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11. Rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. the object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim *Interest reipublicae up sit finis litium* (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held

that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain V/s. Kuntal Kumari*² and *State of W.B. V/s. Administrator, Howrah Municipality*³.

13. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss."

14. Applying the aforesaid principles to the facts of the case, especially the material on record which indicates that the accused kept on giving assurances to make the payment and even implore not to initiate action on the basis of the demand notice, the submission on behalf of the complainant that the complainant was dissuaded from working out the remedies on account of the repeated assurances over a period of time, cannot be said to be inconceivable and unworthy of acceptance.

15. Mr. Pandey made an endeavour to urge that the alleged assurances and promises emanating from the accused did not constitute a sufficient cause in the sense

² AIR 1969 SC 575

³ (1972) 1 SCC 366

that on account of those assurances, the complainant was prevented from lodging the complaint. I am afraid to accede to aforesaid submission. It is not absolutely essential that the cause must relate to the acts or omissions on the part of the party who seeks condonation of delay. In a given case, like the one at hand, even the acts or conduct attributed to the accused may constitute sufficient cause as it could be urged that on account of such acts and conduct, the complainant was made to believe that he need not resort to the proceedings, and was, thus, prevented from instituting the proceedings.

16. The submission which, however, deserves serious consideration is that, since the condonation of delay in a complaint under Section 138 of the Act, 1881 has the potentiality of entailing penal consequences, the court ought not to adopt a very liberal approach, as it impinges upon the right of the accused to fair and speedy trial.

17. To begin with, from the text of proviso to Section 142(1)(b), such restrictive approach in the matter of condonation of delay is not evident. At the same time, it needs to be emphasised that there is a qualitative difference between proceedings which have civil consequences and one's which entail penal consequences. The difference in the approach in the matter of condonation of delay, therefore, cannot be said to be inconceivable.

18. *De hors* the aspect of limitation, where there is no statutory prescription of limitation for filing the complaint and/or lodging the prosecution, the inordinate

delay in commencement of the criminal proceedings has the propensity to infringe the right of an accused to speedy trial guaranteed under Article 21 of the Constitution of India. In exercise of inherent power under Section 482 of the Code of Criminal Procedure or plenary writ jurisdiction, the High Court may be justified in quashing a proceeding for inordinate delay in the commencement of such proceedings. Viewed through this prism, the aspect of condonation of delay in commencement of the prosecution, requires striking of a delicate balance between the interest of the society in prosecution of an offender, and the rights of the accused to be prosecuted and tried within a period which can be termed as reasonable in the circumstances of a given case.

19. A profitable reference can be made to the decision of the Supreme Court in the case of **Sirajul and Ors. V/s. State of Uttar Pradesh and Anr.**⁴ wherein the Supreme Court considered the justifiability of initiation of the prosecution after a delay of 16 years of the alleged occurrence and enunciated the law as under :

“11..... The question whether the proceedings in criminal cases not covered by Section 468 CrPC could be quashed on the ground of delay has been gone into in several decisions. While it is true that cases covered by statutory bar of limitation may be liable to be quashed without any further enquiry, the cases not covered by the statutory bar can be quashed on the ground of delay in filing of a criminal complaint in appropriate cases. In such cases, the question for consideration is whether there is violation of right of speedy trial which has been held to be part of Article 21 of the

4 (2015) 9 SCC 201

Constitution having regard to the nature of offence, extent of delay, person responsible for delay and other attending circumstances.....”

20. The Supreme Court, after adverting to the previous pronouncements, culled out the position in law, as under :

“17. It is thus clear from the above observations that mere delay in completion of proceedings may not be by itself a ground to quash proceedings where offences are serious, but the court having regard to the conduct of the parties, nature of offence and the extent of delay in the facts and circumstances of a given case, quash the proceedings in exercise of jurisdiction under Section 482 CrPC in the interest and to prevent abuse of process of the court.”

21. The aforesaid considerations enunciated by the Supreme Court are germane even when considering the justifiability of the reason to condone the delay in prosecution where the Court is required to take cognizance of the offence beyond the prescribed period of limitation upon being satisfied about the sufficiency of the cause. The extent of delay, nature of the prosecution, the circumstances of the case, the conduct of the parties and the consequences which the prosecution, in the event it ends in conviction, entails, are the relevant factors which bear upon the exercise of the discretion.

22. Re-adverting to the facts of the case, the nature of the proceedings in a complaint under Section 138 of the Act, assumes significance. Learned Counsel for the Petitioner made an earnest endeavour to draw home the point that the prosecution for an offence under Section 138 of the Act, entails punishment, and, therefore, a strict

interpretation is the norm. The courts below could not have, therefore, condoned the delay in a light manner.

23. The aforesaid submission regarding the nature of the proceeding under Section 138 of the Act, cannot be subscribed to, unreservedly. Chapter XVII came to be inserted in the N.I.Act by the Amendment Act, 1988 with the object of enhancing the acceptability of the cheques for the settlement of liabilities. The primary object of visiting the penal consequences to the dishonour of the cheque is not mere penal, but also to maintain the efficiency and value of a negotiable instrument in commercial transactions by making the accused to honour the negotiable instrument and pay the amount for which such instrument had been drawn. The object of provisions contained in Chapter XVII has thus been described as both punitive and compensatory.

24. A profitable reference can be made to a three Judge Bench decision of the Supreme Court in the case of **P. Mohanraj and Ors. V/s. Shah Brothers Ispat Pvt. Ltd.**⁵, wherein, in the context of the applicability of the moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016, to a complaint under Section 138 of the Act, 1888, the Supreme Court elaborately considered the nature of the proceedings under Chapter XVII of the Act, 1888 and, after extensively referring to a large body of judgments, expounded the nature of the said proceedings as under :

“67. A conspectus of these judgments would show that the gravamen

⁵ (2021) 6 SCC 258

of a proceeding under Section 138, though couched in language making the act complained of an offence, is really in order to get back through a summary proceeding, the amount contained in the dishonoured cheque together with interest and costs, expeditiously and cheaply. We have already seen how it is the victim alone who can file the complaint which ordinarily culminates in the payment of fine as compensation which may extend to twice the amount of the cheque which would include the amount of the cheque and the interest and costs thereupon. Given our analysis of Chapter XVII of the Negotiable Instruments Act together with the amendments made thereto and the case law cited hereinabove, it is clear that a quasi-criminal proceeding that is contained in Chapter XVII of the Negotiable Instruments Act would, given the object and context of Section 14 of the IBC, amount to a “proceeding” within the meaning of Section 14(1)(a), the moratorium therefore attaching to such proceeding.”

25. The Supreme Court further delved into the question as to whether the proceedings under Section 138 of the Act, are quasi criminal in nature. In paragraph No.84 of the said judgment, the Supreme Court concluded that given the hybrid nature of a civil contempt proceeding, described as ‘quasi-criminal’ by several judgments of the Supreme Court, there was nothing wrong with the same appellation ‘quasi-criminal’ being applied to Section 138 proceeding for the reasons given by the Supreme Court on an analysis of Chapter XVII of the Act, 1888.

26. Another three Judge Bench of the Supreme Court again had an occasion to consider the nature of the proceedings under Chapter XVII of the Act, 1888 in the case of **Gimpex Pvt. Ltd. V/s. Manoj Goel**⁶. The Supreme Court observed that the nature of the offence under Section 138 of the NI Act is quasi-criminal in that, while it

6 (2022) 11 SCC 705

arises out of a civil wrong, the law, however, imposes a criminal penalty in the form of imprisonment or fine. The purpose of the enactment is to provide security to creditors and instil confidence in the banking system of the country. Laying emphasis on the fact that the statutory regime under the Act, 1881 permits composition of the offence during the pendency of the trial and even after the conviction, the Supreme Court observed that, given that the primary purpose of Section 138 of the NI Act is to ensure compensation to the complainant, the NI Act also allows for parties to enter into a compromise, both during the pendency of the complaint and even after the conviction of the accused.

27. In the case of **Damodar S. Prabhu V/s. Sayed Babalal H⁷** the Supreme Court has observed that it is quite obvious that with respect to offence of dishonour of cheques, it is compensatory aspect of the remedy which should be given priority over the punitive aspect.

28. The aforesaid being the nature of the proceedings under Section 138 of the Act, 1881, the circumstances in which the complainant could not lodge the complaint, within the prescribed period, deserves to be appraised in a slightly different perspective than a case where the prosecution is under an enactment, the primary object of which, is punitive. The conduct of the parties also becomes relevant. If the drawer by his acts and omissions makes the payee forebear from lodging the complaint,

⁷ (2010) 5 SCC 663

within the prescribed period, and the complainant was, thus, made to alter his position believing the representations of the drawer, in my considered view, that would be a relevant consideration and may constitute a sufficient cause. Albeit such an enquiry is rooted in the facts of a given case.

29. In the case at hand, as noted above, there are documents which indicate that after the service of the demand notice, the accused had not only acknowledged the liability, but also expressly requested the complainant not to act on the demand notice. Subsequently, again a MOU was executed acknowledging the liability and promising to pay the amount in five installments. There are number of messages exchanged between the parties on Whatsapp, which lend prima facie credence to the claim of the complainant that he was made to believe the representations of the accused and forebear from lodging the complaint.

30. In the totality of the circumstances, the learned Magistrate cannot be said to have committed an error in exercise of discretion to condone the delay. The Revisional Court was justified in refraining from interfering with the exercise of discretion by the learned Magistrate. As the courts below cannot be said to have exercised the discretion in the manner which could be termed perverse and the discretion has been exercised positively to condone the delay which promotes the cause of substantive justice, this Court does not find any reason to interfere with the impugned orders.

31. Hence, the Petition deserves to be dismissed.

32. Thus, the following order :

ORDER

(i) The Petition stands dismissed.

(ii) Rule discharged.

(iii) No order as to costs.

(N.J.JAMADAR, J.)

33. At this stage, learned Counsel for the Petitioner seeks continuation of the ad-interim order for a period of six weeks so as to approach the Supreme Court.

34. Having regard to the issue dealt with by the Court in this judgment, ad-interim relief shall continue to operate for a period of four weeks.

(N.J.JAMADAR, J.)