Sri Nallathal Spinning Mills Vs Sri Constructions and The Arbitrator Mr. Justice A.K. Rajan

Court: Madras High Court

Date of Decision: Nov. 12, 2010

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 34
Civil Procedure Code, 1908 (CPC) â€" Section 151
Constitution of India, 1950 â€" Article 2
Limitation Act, 1963 â€" Section 5

Hon'ble Judges: V. Periya Karuppiah, J

Bench: Single Bench

Advocate: M.S. Krishnan for Sarvabhauman Associates, for the Appellant; R. Subramanian, for A. Usha Tholgappian, for R1, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

V. Periya Karuppiah, J.
This Revision Petition has been filed against the order dated 09.07.2010 in dismissing the application in I.A. No.

61 of 2007, an application filed under Sections 148 and 151 of the CPC and thereby refusing to condone the delay of 422 days in representing the

appeal papers.

2. The brief facts of the averments raised before the Court below by the revision Petitioner in support of his case for condonation of delay are as

follows:

Originally, the Petitioner engages Thiru. R. Sankaranarayanan as his Counsel to deal with the arbitration proceedings before the High Court,

Madras, and he entrusted all the papers and documents with him pertaining to the Arbitration proceedings. Subsequently, on 07.04.2006, an

Award was passed in Arbitration No. 4 of 2005. On 27.04.2006, the Petitioner challenged the award by filing appropriate petition u/s 34 of the

Arbitration and Conciliation Act, 1996 well within the limitation period by engaging another counsel before the learned Principal District Judge,

Namakkal. However, the appeal papers were returned on 01.06.2006, by the learned Principal District Judge, for compliance of certain defects.

In representing the appeal papers, there has been a delay caused to the extent of 422 days as he could not able to contact his then counsel who

defended him in the arbitration proceedings. At last, he was given to understand that his then counsel very often used to visit foreign countries in

connection with his profession apart from attending Supreme Court and other High Courts. He was able to meet him when his then counsel when

he came down to Komarapalayam to attend a wedding and immediately thereafter, he had managed to meet him at Chennai and obtained the

material documents. In that process, there had been a delay of 422 days in representing the appeal papers. In the mean time, he was served with

attachment notice in R.E.P. No. 23 of 2007. Hence, this petitions to condone the delay of 422 days in representing the papers.

3. The Respondent who obtained the award in the arbitration proceedings filed his counter denying the cause for the delay and contending that the

appeal was returned for rectification only few formal defects. Had the Petitioner filed the data memo and enclosures apart from providing two thick

fly sheets, the appeal would have been numbered. New grounds of objections have been incorporated in the petition at the time of representation.

The reasons stated in the Petitioner for the delay are not acceptable. When the Petitioner engaged a local counsel to agitate the award

proceedings, the question of meeting his then counsel who defended him in the arbitration proceedings would not at all arise when that too the

defects noticed by the Court were all formal defects and the same could have been rectified within a reasonable time. Hence, the petition is liable

to be dismissed.

4. Heard Mr. M.S. Krishnan, learned Senior Counsel for the Petitioner and Mr. R. Subramanian, learned Counsel for the 1st Respondent.

5. The learned Senior Counsel Mr. M.S. Krishnan would submit in his argument that the lower Court has erred in not accepting the prayer of the

Petitioner for condonation of delay in re-presentation of the application which is inconsistent with law. He would further submit in his argument that

the application was filed in time and it was returned for certain defects in the application and the counsel, who was engaged by the Petitioner,

namely Mr. R. Sankaranarayanan, was out of station and gone abroad and therefore, it was not represented by the local counsel immediately, and

the Petitioner could meet the counsel only after a longer period and asked about his application and thereafter only, the counsel acted and had re-

presented the application with an application for condonation of delay and therefore, the Petitioner should not be penalized for the omission of the

counsel. He would further submit that it is only a delay in re-presentation and therefore, it is a matter in between the Petitioner and the Court and

however, the Respondent was also given an opportunity to state his objections. He would also submit in his argument that the lower Court did not

exercise its discretion to condone the delay, even though the re-presentation of delay would not extend the period of limitation, as the application

was presented in time. He would further submit in his argument that the delay of 422 days caused in re-presentation of the application was not

willful, on the part of the Petitioner and he has got a very good case in the application. He would also submit that the Petitioner has questioned the

arbitration agreement itself and on the foot of the said ground, the application is likely to be allowed and therefore, the meritorious claim of the

Petitioner should not be shut by rejecting the application at the threshold, by refusing the condonation of delay in re-presentation. He would also

submit that the lower Court has found that the reasons submitted for condoning the delay are not convincing and acceptable, cannot prejudice the

Petitioner, since the Petitioner was not responsible for the omission of representation and the Petitioner should not be penalized for the act of his

counsel. He would draw the attention of this Court to a judgment of Hon''ble Apex Court reported in The State of West Bengal Vs. The

Administrator, Howrah Municipality and Others, , for the principle that the expression ""Sufficient Cause"" should receive a liberal construction, so

as to advance substantial justice, when no negligence or inaction or want of bona-fide is imputable to a party. He would also bring it to the notice

of this Court yet another judgment of Hon''ble Apex Court reported in N. Balakrishnan Vs. M. Krishnamurthy, , for the same principle. The

learned Senior Counsel would bring it to the notice of this Court to a judgment of Hon''ble Apex Court reported in 2002(1) CTC 769 in between

Ram Nath Sao @ Ram Nath Sahu and Ors. v. Goberdhan Sao and others, for the same principle. He would also cite a judgment of this Court

reported in 2006(4) LW 230 in between M.N. Abdul Wahab v. Salem City Municipality Corporation for the principle that the negligence of other

persons should not be considered as that of the party, who is applying for condonation. He would also draw the attention of the Court to a

judgment of this Court reported in 2009 (4) CTC 722 in between S. Janaki v. Swetha Associates, represented by its partner, Mr. P. Sureshkumar

and others, for the principle that the Court should not refuse to condone the delay in filing any application, even, if the Defendant has contributed to

such delay and in such circumstances, this Court should consider the position of the opposite party by compensating with cost for his laches, if any.

6. He would also submit that the delay caused in re-presentation of the appeal cannot be treated as the delay in filing the application and the delay

should have been condoned in such cases liberally as it is a matter in between the Court and the Petitioner as per various judgments of this Court.

He would therefore, request that the order passed by the lower Court in rejecting the plea of the Petitioner to condone the delay in re-presentation

of 422 days has to be interfered and set aside and the revision be allowed with suitable conditions.

7. The learned Senior Counsel Mr. R. Subramaniam would submit in his argument that the lower Court was correct in dismissing the claim of the

Petitioner, since there is no merit in the appeal as well as the reasons for delay are not acceptable nature. He would further submit that the return of

the applications by the Court was only on flimsy reasons that batta to be enclosed and 2 fly sheets to be attached and it did not require service of

the Madras counsel to go comply and re-present the same and the reason submitted so cannot be accepted. He would also submit in his argument

that the Petitioner has added in the grounds of application after the re-presentation and such grounds would require proper limitation period and

therefore, it could not be considered that the delay was caused only in re-presentation of the application. He would further submit in his argument

that when the reasons submitted by the Petitioner were not acceptable, there is no question of any maintainability of the application. The arbitrator

was appointed by the order of the Hon''ble The Chief Justice as per Section 11 of Arbitration and Conciliation Act, and it cannot be questioned, in

the application since it has got the perspective effect and therefore, there could be any merit in the appeal as argued by the Petitioner.

8. He would cite a judgment of Hon''ble Apex Court reported in 2009(1) MLJ 936 in between Unissi (India) Pvt. Ltd., v. P.G. Institute of

Medical Education & Research for the principle that the arbitration can be inferred from even the tender documents indicating certain conditions of

contract contained arbitration clause and no formal agreement need be executed, for arbitration.

9. He would also cite a judgment of Hon''ble Apex Court reported in AIR 2001 SC 3730 in between Smita Conductors Ltd., v. Euro Alloys Ltd.,

for the same principle. He would also submit in his argument that the Petitioner has stated false particulars in the affidavit and therefore, the lower

Court did not accept the versions of the Petitioner and had correctly rejected the claim of condonation.

10. He would also cite a judgment of this Court made in C.R.P. N.P.D. No. 3309 of 2010 dated 24.09.2010 in between Janarthanan v.

Chandrasekaran in support of his argument. He would further submit that the lower Court, has exercised its jurisdiction correctly and had come to

a conclusion that the Petitioner has not come to Court with correct particulars and therefore, the request submitted by the Petitioner was not

accepted and hence, there is no necessity for this Court to interfere with the orders passed by the lower Court and hence, the petition is liable to

be dismissed.

11. I have given anxious thoughts to the arguments advanced on either side. The in disputed facts are that the Petitioner has filed an application to

set aside the award passed by the 2nd Respondent on 07.04.2006 in Arbitration No. 4 of 2005 u/s 34 of the Arbitration and Conciliation Act, on

27.04.2006 the said petition was returned by the lower Court on 01.06.2006, for certain defects. The said returned application was re-presented

with the delay of 422 days and therefore, an application was filed by the Petitioner before the lower Court seeking for condonation of delay in re-

presentation.

12. Now, the disputes in between parties are that the said delay of 422 days was caused beyond the control of the Petitioner, which was denied

by the 1st Respondent. The lower Court had considered the case of both sides and had come to a conclusion to dismiss the said application.

According to the Petitioner, the delay was caused due to the non-availability of his Madras counsel since he was not available in India and he could

only meet the Madras counsel long after in a social function and thereafter only the local counsel could act for complying with the returns. The said

plea was stoutly opposed by the 1st Respondent that it is not sufficient to condone the delay. The lower Court accepted the contention of the

Respondent and had rejected the plea of the Petitioner.

13. Now, the point for consideration is whether the discretion exercised by the lower Court in rejecting the claim of condonation in re-presentation

of the application is in accordance with law. The condonation sought for by the Petitioner was in respect of the condonation of the re-presentation

of an application which was already filed into Court within the period of limitation as stipulated by law. However, it has been contended by the

Respondent that certain grounds have been newly raised and those grounds cannot be introduced subsequently, except with the permission of the

Court, but it has been inserted and filed after the period of limitation. As regards, the judgments of the Hon''ble Supreme Court submitted by the

learned Senior Counsel for the Petitioner, they would categorically lay that the condonation of delay should have been considered liberally.

According to the judgment reported in The State of West Bengal Vs. The Administrator, Howrah Municipality and Others, , the principle in

construing the expression ""Sufficient Cause"" has been explained as follows:

30. From the above observations it is clear that the words ""sufficient cause"" should receive a liberal construction so as to advance substantial

justice when no negligence or inaction or want of bona-fide is imputable to a party.

14. The said view was up-held in a later judgment of the Hon''ble Apex Court reported in N. Balakrishnan Vs. M. Krishnamurthy, . The relevant

passage would run thus:

12. A Court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that

delays in approaching the Court is always deliberate. This Court has held that the words ""sufficient cause"" u/s 5 of the Limitation Act should

receive a liberal construction so as to advance substantial justice vide Shakunthala Devi Jain v. Kuntal Kumari and State of West Bengal v.

Administrator, Howrah Municipality

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 forth as part of a dilatory strategy,

the Court must show utmost consideration to the suitor....

15. The said principle was also up-held in yet another judgment of the Hon''ble Apex Court reported in 2002(1) CTC 769 in between Ram Nath

Sao @ Ram Nath Sahu and Ors. v. Goberdhan Sao and Ors.. The relevant passage would run as follows:

12. Thus it becomes plaint that the expression ""sufficient cause"" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any

other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide

is imputable to a party. In a particular case whether explanation furnished would constitute ""sufficient cause"" or not will be dependent upon facts of

each case. There cannot be a straitjacket formula or accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing

is clear that the Courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in

over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or

inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the Courts should not lose

sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly

defeated by condoning delay in a routine like manner. However, by taking a pedantic and hyper technical view of the matter the explanation

furnished should not be rejected when stakes are high and / or arguable points of facts and law are involved in the case, causing enormous loss and

irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the

decision on merit. While, considering the matter, Courts have to strike a balance between resultant effects of the order it is going to pass upon the

parties either way.

Following the said principle, this Court has also come to the conclusion that the litigant should not be shut from offering his defense by refusing to

condone the delay in a judgment reported in 2009(4)CTC 722.

16. Apart from this, a judgment of a 1st Bench of this Court reported in 1993 TLNJ 375 in between Y. Cusbar v. K. Subbarayan has been to the

point at issue, towards the principle that the delay in re-presentation of papers cannot be put to the account of the party and it has to be considered

liberally. It has been categorically held as follows:

This is not a case where-in the appeal has been filed out of time. This is a case in which the appeal is filed in time. Therefore, it cannot be said that

the decree under appeal has assumed finality and the right has been accrued to the Respondent. The delay in representation of the papers in the

instant case, cannot be put to the account of the party. Several times, it happens due to the mistake on the part of the advocate"s clerk or the

advocates in presenting the appeal. Therefore, the Court has to take care to see that the justice does not suffer in such cases. If there is any undue

delay in representation of the papers it can be compensated by awarding costs. Therefore, we are of the view that when the appeal has been filed

in time, but there is inordinate delay in representation of the papers returned for rectification of the defects, by the appellate Court, the delay can be

condoned on taking a lenient view by compensating the other side on payment of costs.

17. It is true that this Court has also come to a conclusion in a judgment reported in 2002 (3) CTC 22 in between Buvaneshwari v. Elumalai, for

the principle that the re-presentation delay is only an administrative order and it is not a judicial order. The relevant passage in the judgment would

read thus:

14. The time granted by the Court for the representation of the plaint, is only an administrative order and not a judicial order, and as such, if there

is any delay in the representation of the plaint, an application to excuse the said delay could be filed u/s 151, CPC and it need not necessarily be

the one u/s 148, Code of Civil Procedure. In fact, Section 151 CPC is an omnibus provision available in the code to make suitable orders, which

was filed u/s 151, CPC would have been allowed by the Trial Court. Even otherwise, the substance of the petition is more important than the form.

Mere quoting of the provision wrongly, is not fatal to the petition itself. In that view of the matter also, the Trial Court could have allowed the said

petition in excusing the delay in representation of the plaint.

18. The said view of this Court was also confirmed by yet another judgment of this Court reported in 2004 (3) MLJ 607 in between Muthusamy

(died) and Ors. v. Ammasi alias Muthu Gounder and Ors.. It would even go to show that no notice need to be sent to the Respondent in an

application filed by the Petitioner seeking condonation of delay in re-presentation of papers. The relevant passage would run thus:

There was a delay of 117 days in re-presenting the appeal papers, to condone which, I.A. No. 170 of 1996 was filed and it was dismissed by the

Sub-Court, Sankari. It is that order which is in challenge in this revision. In view of the judgments of this Court in the cases reported in 1978

T.N.L.J.332 and 1993 T.N.L.J.375, to the effect that, in matters like this, no notice need be sent to the party in opposition the approach of the

learned Sub-Judge in refusing to condone the delay is erroneous. Consequently, the impugned order is set aside and the revision is allowed.

19. However, the learned Counsel for the 1st Respondent had argued that the Petitioner has no case in the application to set aside the award and

therefore, the rejection of re-presentation would not cause any loss or prejudice to the Petitioner. For that he had argued, for the appointment of

arbitrator, u/s 11 is a judicial order and it would take perspective effect and it cannot be set aside and the only point raised by the Petitioner in the

said application would be no use and therefore, there cannot be any meritorious case for the Petitioner to be closed at the threshold of rejecting the

condonation. Apart from that the further contention of the 1st Respondent would be that the existence of the arbitration agreement can be inferred

by various circumstances. For that he has relied upon a judgment of the Hon''ble Apex Court reported in AIR 2001 SC 3730 in between Smita

Conductors Ltd., v. Euro Alloys Ltd. The relevant passage would run thus:

6. What needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is

explained by para 2 of Article 2. If we break down para 2 into elementary parts, it consists of four aspects. It includes an arbitral clause, (1) in a

contract containing an arbitration clause signed by the parties, (2) an arbitration agreement signed by the parties, (3) an arbitral clause in a contract

contained in exchange of letters or telegrams, and (4) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause

falls in any one of these four categories, it must be treated as an agreement in writing....

...May be, the Appellant may not have addressed letters to the Respondent in this regard but once they state that they are acting in respect of the

contracts pursuant to which letters of credit had been opened and they are invoking the force majeure clause in these two contracts, it obviously

means that they had in mind only these two contracts which stood affirmed by reason of these letters of credit. If the two contracts stood affirmed

by reason of their conduct as indicated in the letters exchanged, it must be held that there is an agreement in writing between the parties in this

regard.

20. In the judgment of the Hon''ble Apex Court reported in 2009(1) MLJ 936 in between Unissi (India) Pvt. Ltd., v. P.G. Institute of Medical

Education & Research, the principle would also run thus:

14. Therefore, considering the above aspects of the matter in this case, we must come to this conclusion that although no formal agreement was

executed, the tender documents indicating certain conditions of contract contained an arbitration clause. It is also an admitted position that the

Appellant gave his tender offer which was accepted and the Appellant acted upon it.

21. The applicability of the judgments of Hon''ble Apex Court to find out the merits of the case, in the application to set aside the award cannot be

discussed in this application for the condonation of delay in representation and it has to be argued, at the time of the disposal of the said

application, if ordered to be numbered. Apart from the said judgments, the learned Counsel for the 1st Respondent had quoted a judgment of this

Court made in C.R.P .NPD. No. 3309 of 2010 dated 24.09.2010 in between Janarthana v. Chandrasekaran, for the principle that the laches on

the part of the Petitioner has to be deprecated while exercising the discretion in condonation of delay. The relevant passage would run thus:

...The said facts and circumstances of the case discussed therein is totally applicable to the present case. The Petitioner has engaged his lawyer

during the passing of ex-parte decree and thereafter, he was served with execution petition and he has contested through the same counsel and

thereafter, he has received yet another notice in the said execution petition for delivery of possession has taken much time to approach the Court to

condone the delay in filing the application to set aside the ex-parte decree. In such circumstances, the lethargic attitude of the Petitioner shows that

he has leisurely preferred the application to condone the delay as well as the application to set aside the ex-parte decree which cannot considered

for the grant of any discretionary relief.

22. On a careful perusal of the said judgment, it has been ordered in a case where the condonation of delay sought for by the Petitioner therein, in

filing an application to set aside exparte decree. This Court had found that the Petitioner was very much lethargic in filing such an application, even

after entered appearance in the E.P., proceedings and contested the same and thereafter, chosen to file such an application to condone the delay.

As far as this case is concerned, the re-presentation delay even though found on the part of the Petitioner, it was purely due to the inaction, on the

part of the counsel, as rightly pointed out by the Division Bench judgment of this Court reported in 1993 TLNJ 375. The stake of the dispute and

the award passed by the arbitrator was to a sum of Rs. 24,30,022/-with subsequent interest at the rate of 12% per annum and for total sum of Rs.

42,28,328/-, which was awarded with interest and cost. The Petitioner has also made serious contentions in the counter statement and the lower

Court has to go through the Arbitration Award and to see whether such an award is liable to be set aside under the provisions of Section 34 of the

Arbitration and Conciliation Act, or not. By virtue of the dismissal of the application for condonation of delay in re-presentation, the right to

question the award u/s 34 of Arbitration and Conciliation Act, has been foreclosed. Such circumstance would certainly prevent the rights of the

parties, who had filed the application in time, before the Court from getting any relief as per law. No doubt, the delay of 422 days have been

caused in re-presentation of papers. As per the dictum in the judgment of the Division Bench of this Court, the re-presentation delay is only an act

or omission of the counsel and it cannot be imputed as the laches on the part of the litigant.

23. The only inaction which could be attributed against the Petitioner could be that he had not contacted his counsel then and there, regarding his

application returned for curation. But, the very negligence is on the part of the advocate''s office and it shall not penalize a litigant. Therefore, the

principles laid down by the 1st Bench of this Court reported in 1993 TLNJ 375 in between Y. Cusbar v. K. Subbarayan, is squarely applicable to

the facts of this case, that substantial justice shall be done to both parties by condoning the delay in re-presentation.

24. Therefore, it has become necessary for this Court to interfere with the order of the lower Court in refusing the condonation of delay in re-

presentation and to set aside the same. The lower Court ought to have condoned the delay as it is not the fault of the Petitioner. At the same time,

the inordinate delay of 422 days has to be condoned, after compensating the Respondent suitably. Therefore, this Court comes to a conclusion to

allow the revision petition on condition to deposit a sum of Rs. 5,00,000/- (Rupees Five Lakhs Only) before the lower Court to the credit of I.A.

No. 61 of 2007 in unnumbered Arb.O.P. No. ___ of 2007, on the file of the learned Principal District Judge, Namakkal, within a period of four

weeks from today for condoning the delay of 422 days in re-presentation. On such compliance, the lower Court is directed to number the said

application, if otherwise in order and to proceed with the application in accordance with law. The amount so deposited shall be kept in a fixed

deposit in any one of the nationalized Banks till the final adjudication in the said application. In default to deposit the said amount within such

period, the revision preferred by the Petitioner shall stand dismissed automatically without any further reference to this Court.

25. In the result, the revision petition is ordered with the aforesaid conditions. No order as to costs. Consequently, connected miscellaneous

petition is closed.