(2009) 07 CAL CK 0031

Calcutta High Court

Case No: M.A.T. 526 of 2009

Regional P.F. Commissioner, West Bengal		APPELLANT
	Vs	
Edwin Reeves and Others		RESPONDENT

Date of Decision: July 20, 2009

Acts Referred:

- Arbitration Act, 1940 - Section 39
- Limitation Act, 1963 - Section 14, 5

Citation: (2009) 07 CAL CK 0031

Hon'ble Judges: Singh Nijjar, C.J; Biswanath Somadder, J

Bench: Division Bench

Advocate: Kalyan Bandyopadhyay, Shib Chandra Prasad, for the Appellant; Jahar Lal De, Sanghamitra Nandy, for the Respondent

Final Decision: Allowed

Judgement

1. We have heard the Learned Counsel for the parties. An order was passed by the learned Single Judge on 7th June, 1996 directing the applicants to include the petitioner as a member of the Employees'' Pension Scheme, 1995. This order was not challenged by the applicant by filing appeal. Rather an application was filed on 27th November, 1997 seeking modification of the aforesaid order. It deserves to be noticed here that this application for modification was beyond limitation. The application remained pending in this Court and was ultimately disposed of on 9th May, 2008 with the observation that the application is not maintainable. Even at that stage no appeal was filed against either of the two owners dated 7.6.96 and 9.5.2008. In the mean time the writ petitioner had filed contempt application on 5th December, 1997. The application for contempt came up for hearing before the appropriate court on 12th February, 2009 and the judgment was delivered on 17th April, 2009. The court took notice of the various events leading to the

filing of the contempt application and made the following observations:-

"Now that the applications for vacating the orders dated 7.6.1996 have been dismissed and the same have not been challenged in any other proceedings. I may not be unjustified in committing the contemnors/respondents for contempt of Court based on the authority of these decisions since it is not open to me to test the correctness of the orders dated 7.6.1996.

However, I must bear in mind that the jurisdiction to punish for civil contempt is exercised by Courts with caution and circumspection. When a party by his willful and deliberate act (s) disobeys an order of court without reasonable cause or justification and thereby manifests extreme lack of solicitude for the Court, it ought to be the endeavour of the court in exercise of contempt powers to prevent undermining of its dignity, majesty and prestige and also to uphold the rule of law so that a decision which was attained finality is duly implemented. But would the Court be overzealous to ensure compliance with an order passed by it even though it is apparent that an attempt to have it set aside has been nullified because of filing of an improper application ? Should the basic duty of dispensing justice to all be jettisoned because of technicalities which are nothing but handmaids of justice ? I think the answer ought to be in the negative.

It is noticed that immediately after the orders dated 7.6.1996 had been passed and communicated to the contemnors / respondents, efforts were made by them to ascertain facts. Having been seized of information that the petitioners were not entitled to be enrolled under the 1995 Scheme, they applied for vacating the said orders on 27.11.1997. After remaining pending for eleven long years, the applications have been dismissed. The Contempt Rules have thereafter been heard by me. There cannot be any doubt that after the writ petitions were disposed of finally, the contemnors/respondents could not have prayed for setting aside or vacating of the orders dated 7.6.1996 without taking recourse to proper remedies. However, the fact that an attempt was made is a pointer to the fact that they were not sitting idle. In such circumstances, it is difficult for me to return a finding at this stage that there has been willful and deliberate violation of the Court''s orders dated 7.6.1996.

I, therefore, do not propose to proceed further with the Contempt Rules. The same are adjourned, returnable on 19.6.2009. It shall be open to the contemnors/respondents either to comply with the orders dated 7.6.1996 or to have the same set aside by the competent court in the meantime."

2. Armed with this order, the applicant has filed the present application for condonation of delay in filing an appeal against the initial order dated 7th June, 1996. The exact delay is 4726 days.

3. An affidavit in support of the application has been filed. The respondents have filed an affidavit-in-opposition. The applicant has also filed a supplementary affidavit. We have

perused the application and various affidavits filed by the parties in connection thereto. We have also heard the Learned Counsel for the parties.

4. Mr. Bandyopadhyay submits that undoubtedly there was a delay of one year and two months in filing the application for modification. However, the application for modification was filed relying upon the advice rendered by the Advocate. In view of the Advocates advice the applicant bona fide believed that it was not a fit case to file the appeal but necessary relief ought to be sought by taking out an application for modification of the order dated 7th June, 1996. Learned Counsel also submits that in fact the applicant was anxious to implement the order passed by this Court. Barely within two months of the order having been passed and soon after its receipt in the office, the applicant addressed a communication on 7th August, 1997 to the company seeking clarification on two issues namely-

1. Whether the petitioner was a member of the ceased Family Pension Scheme, 1971, and

2. The date of authorization of Provident Fund and other allied dues by your organization."

5. This letter was replied by Dunlop India Limited on 28th August, 1997, in which it is categorically stated that the petitioner was not a member of the 1971 Pension Scheme. He had, however, been a member of the provident fund since 18th January, 1995. This letter was received by the applicant on 13th September, 1997. Since the application for modification was filed on 5th December, 1997, no further action was taken. This apart, Learned Counsel sought to argue that the order passed by the learned Single Judge on 7th June, 1996 cannot be legally implemented. At this stage, we are not concerned with the merits of the submissions that would be made by the appellant in case the delay is condoned. Mr. Bandyopadhyay submits that since the applicant was pursuing a wrong remedy bona fide, the delay ought to be condoned on the ground that sufficient cause has been shown by the applicant for such delay. He relies on judgments of the Supreme Court reported in State of Haryana Vs. Chandra Mani and others, , Sunder Das and others Vs. Gajananrao and others, and N. Balakrishnan Vs. M. Krishnamurthy,

6. On the other hand, Learned Counsel appearing for the respondents submits that there is no explanation rendered by the applicant for the delay between 7th June, 1996 till 27th November, 1997.Even the reply to the letter dated 7th August, 1997 had been received on 13th September, 1997. The application for modification was filed 27th November, 1997. This apart the modification application itself was dismissed as not maintainable on 9th May, 2008 and the present appeal has been filed on 15th June, 2009. This application seeking condonation of delay has been prompted by the observations made by the learned Single Judge in the order dated 17th April, 2009, otherwise the applicants would not have cared to file this application for condonation of delay, nor would they have taken a decision to file an appeal against the order. Learned Counsel submitted that the delay

can only be condoned when it is satisfactorily and convincingly explained. In support of these submissions the Learned Counsel relies on a judgment of the Supreme Court in the case of D. Gopinathan Pillai Vs. State of Kerala and Another, .

7. We have considered the submissions made by the Learned Counsel for the parties. The legal position with regard to the condonation of delay has been reiterated by the Supreme Court in the number of cases. In the case of Chandra Mani (supra) a two Judge Bench considered the question of limitation in an appeal filed by the State and held that Section 5 of the Limitation Act, 1963 was enacted in order to enable the court to do substantial justice to the parties by disposing of all matters on merits. The expression "sufficient cause" is adequately elastic to enable to court to apply the law in a meaningful manner which subserves the end of justice - that being the right purpose for the existence of the institution of courts. In that case it was also observed that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. The Supreme Court further held as follows:

"10. ..... when the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the - buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective cause of the community. It is axiomatic that decisions are taken by officer/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay- intentional or otherwise - is a routine. Considerable delay of procedural red tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression "sufficient cause" should, therefore, be considered with pragmatism in justice-oriented approach rather than the technical detection of sufficient cause for explaining every day"s delay....."

8. Section 14 of the Limitation Act, 1963 provides that in computing the period of limitation the time during which the applicant has been prosecuting with due diligence another civil proceeding in good faith shall be excluded. In the present case, the application for modification has been filed on the wrong advice of the counsel. Therefore, the period between 27th September, 1997 till 9th May, 2008 would have to be excluded. In Sundar Das"s case (supra), a suit had been filed in a court not having jurisdiction. Ultimately, the plaint was returned for presentation to the proper court. When the second suit was filed it was beyond limitation. The Supreme Court held that "originally the suit was filed within limitation, but it was filed before a Court which was found to be lacking in pecuniary jurisdiction and when it was re-filed before a competent Court the plaintiffs were entitled to the benefit of Section 14 of the Limitation Act enabling them to get exclusion of the time

from 20th August, 1970 to 22nd November, 1975, when the High Court took the view that the suit should be returned for presentation to the proper Court. It is obvious that the plaintiffs were prosecuting in good faith their suit before a Court which, from defect of pecuniary jurisdiction, was unable to entertain it and if this period gets excluded the re-filed suit on 26th November, 1975, would remain within limitation of 12 years from the date of the impugned Sale Deed. The plea of bar of limitation as raised by the Learned Counsel for the contesting defendants, therefore, stands rejected". In the present case the application for modification was undoubtedly filed beyond limitation but no objection seems to have been raised and the application has been decided on merits. It remained depending in court for a period of 11 years. In view of the application for modification having being entertained, the delay is deemed to have been condoned for that period.

9. In the case of N. Balakrishnan (supra), the Supreme Court again reiterated that rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics, but seek the remedy promptly. It was also held that if the explanation does not smack of Malafides or it is not put forth as part of a dilatory strategy the Court must show utmost consideration to the suitor.

10. We are of the considered opinion that the applicant herein has been able to satisfactorily explain the delay in not filing the appeal. The intention of the applicant to comply with the order of the learned Single Judge was clearly evident from the letter dated 7th August, 1997. We would, therefore, not be justified in non-suiting the applicant for the delay which may seem to have occurred between 7th June, 1996 till 27th November, 1997.

11. So far as the delay between the decision of the application for modification dated 9th May, 2008 till the filing of the present appeal, i.e. 15th June, 2009 is concerned, cannot be said to be Malafide as admittedly the contempt proceedings have been pending since 5th December, 1997.

12. The judgment in the case of Gopinath Pillai (supra) relied upon by the Learned Counsel for the respondents would not be applicable in the facts of the present case. In that case, the Supreme Court was considering a case where there was absolutely no explanation for the inordinate delay of 3320 days in filing the appeal. The High Court without going into the merits of the application for condonation of delay, observed "that if the application to set aside the award is ultimately dismissed then the appellant cannot be said to be aggrieved and that if the said petition is ultimately allowed and the arbitral award passed in favour of the appellant is set aside then his remedy is to file an appeal u/s 39 of the Arbitration Act, 1940." The Supreme Court further noticed that the Principle Sub-Judge had also condoned the delay of 3320 days with the observation that "the Officers of the State of Kerala have committed gross negligence in not filing the objection for a long period of 3320 days and therefore, for the fault of the Officers the State should not be penalized". In view of the above the Supreme Court observed as follows:

"5. We are unable to countenance the finding rendered by the Sub-Judge and also the view taken by the High Court. There is no dispute in regard to the delay of 3320 days in filing the petition for setting aside the award. When a mandatory provision is not complied with and when the delay is not properly, satisfactorily and convincingly explained, the court cannot condone the delay, only on the sympathetic ground. The orders passed by the learned Sub-Judge and also by the High Court are far from satisfactory. No reason whatsoever has been given to condone the inordinate delay of 3320 days. It is well-considered principle of law that the delay cannot be condoned without assigning any reasonable, satisfactory, sufficient and proper reason. Both the courts have miserably failed to comply and follow the principle laid down by this Court in a catena of cases. We, therefore, have no other option except to set aside the order passed by the Sub-Judge and as affirmed by the High Court. We accordingly set aside both the orders and allow this appeal."

13. In the present case, the applicant has been at pains to explain the delay. At each and every stage, there was a supervening event. The initial order was passed on 7th June, 1996. The applicant was anxious to comply with the order and therefore, sought factual clarifications from the company where the petitioner was employed through letter dated 7th August, 1997. This letter was replied on 13th September, 1997. This was compounded with the wrong opinion of the counsel. In the mean time, the contempt proceedings had been commenced at the instance of the writ petitioners. The modification application was dismissed on 9th May, 2008. The contempt petition is still pending. Although in the order dated 17th April, 2009, it has been clearly held that the court does not propose to proceed further with the contempt rule.

14. In such circumstances, we are of the considered opinion that the applicant has been able to satisfactorily explain the delay in not filing the appeal.

15. In view of the above, we allow this application for condonation of delay.

16. Let the appeal along with the application for stay be listed for hearing on Thursday week, i.e. 30th July, 2007.