

(2012) 09 CAL CK 0049

Calcutta High Court

Case No: C.O. 1211 of 2012 and C.O. 1212 of 2012

Nabarun Bhattacharyya and
Another

APPELLANT

Vs

Kotak Mohindra Bank Ltd. and
Others

RESPONDENT

Date of Decision: Sept. 12, 2012

Acts Referred:

- Limitation Act, 1963 - Section 5
- Recovery of Debts Due to Banks and Financial Institutions Act, 1993 - Section 19, 19(25), 20(3), 21

Hon'ble Judges: Soumen Sen, J

Bench: Single Bench

Advocate: Saktinath Mukherjee, Mr. Saptangshu Basu, Mr. Aniruddha Roy and Mr. Kaushik Banerjee, for the Appellant; Jishnu Chowdhury, Dhruva Ghosh, S. Dasgupta and Mr. P. Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

Soumen Sen, J.

The order of rejection of the application for condonation of delay of 7 years 11 months and 19 days by the guarantor petitioner in preferring an appeal against the order dated 29th July, 2003 passed by the Debt Recovery Tribunal (hereinafter referred to as "DRT") in O.A. No. 131 of 2001 is the subject-matter of challenge in this revisional application. The learned Debt Recovery Appellate Tribunal (hereinafter referred to as "DRAT") rejected the said application observing that the explanation and reason given for delay does not inspire the confidence of the Tribunal.

2. The petitioners are the guarantors. The petitioners duly contested the original recovery proceeding initiated u/s 19 of the Recovery of Debts and Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "RDB" Act). The certificate was issued on 6th August, 2003. Immediately thereafter execution proceeding was

initiated. A period little short of three years from the date of issuance of certificate, the guarantors on April 5, 2006 filed an application before the learned Recovery Officer contending that the said Officer has no jurisdiction to execute the said certificate. Subsequently, on 13th July, 2006, the petitioners took out another inter alia application before the learned Presiding Officer u/s 19(25) of the RDB Act praying, inter alia, for an order of injunction restraining the Recovery Officer from proceeding with the execution of the certificate. On 20th March, 2007, the petitioners applied before the Recovery Officer questioning its jurisdiction to proceed against one of the properties which is situated at Jharkhand.

3. The Presiding Officer refused to grant any stay in connection with the application filed on 13th July, 2006 and by a subsequent order dated 12th April, 2007, the said application for stay of execution was rejected. Against the order of the Presiding Officer in dismissing the application for stay of the execution proceeding, an appeal was affirmed by the DRAT on 12th June, 2008. The said order of the DRAT was unsuccessfully challenged in a revisional application in this Court on 21st July, 2008. The revisional application was dismissed on 16th July, 2009. A SLP was filed on 10th September, 2009 against the said order of dismissal. The Hon"ble Supreme Court admitted the said SLP and granted an order of stay of recovery proceedings. The petitioner contended that during the pendency of the SLP in or about December 20, 2010 the petitioner during consultation with the Senior Counsel was advised to challenge the judgment and order dated 29th July, 2003 before the learned Appellate Tribunal and upon receiving such advice, steps were taken to file the appeal with a prayer for condonation of delay. The said application was filed in 2011 and the delay between December 20, 2010 and May, 2011 was sought to be explained by stating that after receiving advice during consultation one of the guarantors, namely, Mr. Nabarun Bhattacharyya felt serious ill and as such he could not contact the learned Advocate for the petitioner between December 20, 2010 and May, 2011. It was only on 26th May, 2011 he could give instruction to his learned Advocate for drafting and filing the said appeal. Such appeal was filed after reopening the Court after summer vacation in June, 2011. This is the explanation in substance for condonation of delay of 7 years 6 months and 19 days (although in the petition the delay is mentioned as of 7 years and 11 months). It is an admitted fact that till the filing of the SLP in the year 2010, the petitioner did not feel it necessary to prefer an appeal against the certificate. The said certificate was issued on contested hearing. The petitioner was aware of the said judgment and certificate but did not prefer an appeal within the period of 45 days from the date on which a copy of the said order made or deem to have been made by the Tribunal, is received by the petitioner in terms of Section 20(3) of the DRT Act, 1993. In fact, the Appellate Tribunal may entertain an appeal after the expiry of the said period of 45 days if it is satisfied that there was sufficient cause for not filing it within the prescribed period. Section 21 of the DRT Act, 1993 requires deposit with the Appellate Tribunal 75 per cent of the amount of debt so due from him as determined by the Tribunal u/s 19

provided that the Appellate Tribunal may for reasons to be recorded in writing waive or reduce the amount to be deposited under the said section. In the entire period of 7 years, the petitioner contested the recovery proceeding but did not challenge the judgment culminated in issuance of the certificates. The reason is obvious. In order to resist any application before the Recovery Officer for stay of execution proceeding, the pre-deposit u/s 21 is not required to be made and the judgment-debtor can delay the said proceeding which would be as good as an order of stay without any pre-deposit. The petitioner was successful in keeping the execution proceeding in abeyance for 7 years without putting any money. The subject-matter of challenge in the SLP is not the judgment and order passed by the DRT on 29th July, 2003.

4. In fact, the original application was filed in the year 2003 for recovery of a sum of Rs. 5,85,70,413/- against the petitioners and the respondent Nos. 4 & 5. It appears that pursuant to an amicable settlement arrived at between the ICICI Bank Ltd. and Oriental Bank of Commerce out of total decretal amount of Rs. 5,85,70,413/-, the respondent No. 2, ICICI Bank has received a sum of Rs. 3.35 crores. The balance amount that is Rs. 2.35 crores as on 31st December, 2004 along with interests, charge costs etc. are still due and payable by the petitioners along with other judgment-debtors to the opposite party No. 1. During the execution of the said certificate, the petitioner filed an applications in the year 2006 objecting to such executions on technical grounds. The certificate on merit was not under challenge till the filing of the application u/s 5 of the Limitation Act in June, 2011.

5. The learned Advocate for the petitioner submits that liberal approach should be taken in considering the said application u/s 5 of the Limitation Act. It is argued that the petitioners have been diligent in pursuing their remedy. The application resisting execution of the said certificate was although filed almost after two and half years but there has been no lack of due diligence on the part of petitioners in proceeding with the matter. The petitioners incidentally submitted that one of the main contentions in the appeal would be that by reason of a compromise between ICICI Bank and Oriental Bank of Commerce, the petitioners as guarantors stand discharged of their liability. In fact, there is a novation of contract. The said compromise has discharged the guarantors from all liability.

6. The petitioners submitted that unless the petitioners are allowed to contest the said appeal, the petitioners would be prevented from raising such questions and there are arguable points which are required to be considered and decided on merits. The proposed grounds of challenge if they are allowed to prefer an appeal different from the grounds urged in the SLP (SLP) pending before the Hon"ble Supreme Court. The subject matter of SLP and the subject matter of challenge in the appeal are different.

7. Per contra, the learned Advocate for the opposite party No. 1 submits that the filing of this application u/s 5 of the Limitation Act after an inordinate delay of more

than 7 years is another ploy to resist the execution of the certificate. It is submitted that the said certificate was issued on contest and the petitioner was even aware of the settlement arrived at between the ICICI Bank and Oriental Bank of Commerce. There has been no contemporaneous challenge to the said certificate and the order recording such compromise between the ICICI Bank and Oriental Bank of Commerce. In fact, by reason of such compromise, the liability of the sureties have been substantially reduced. Moreover, it is continuing guarantee and the guarantee documents provide that any satisfaction or compromise between the parties would not discharge the guarantor-petitioners from their obligation to fully discharge the debts. It is submitted that such inordinate delay is inexcusable and the petitioner is not entitled to condonation of delay after the lapse of more than 7 years.

8. The expression "sufficient cause" has not been defined under the Limitation Act, 1963 leaving it to the discretion of the Court. The Court is required to consider and construe the expression "sufficient cause" in a given facts and circumstances in order to ascertain if the explanations given for not approaching a Court of law within the period of limitation was really due to reasons beyond the control of the petitioners. In considering the said application after condonation of delay, although every day, every minute and every second delay is not to be explained but the Court is required to consider the explanation as a whole and ascertain whether the inaction on the part of the petitioner in approaching the Court beyond limitation was intentional and deliberate or otherwise. The Court is required to find out whether such conduct is inexcusable and suffers from culpable negligence. The backgrounds of the petitioner are also not to be taken into consideration since a rustic villager cannot be equated with an urban entrepreneur. In a matter of condonation of delay when there was no gross negligence, deliberate inaction or lack of bona fide, a liberal concession has to be adopted to advance substantial justice. ([Office of The Chief Post Master General and Others Vs. Living Media India Ltd. and Another,](#)

9. The Hon"ble Supreme Court in [Lanka Venkateswarlu \(D\) by L.Rs. Vs. State of A.P. and Others,](#) considered the expression "sufficient cause" in Paragraphs 19, 26 and 29, which are reproduced hereinbelow:-

19. We have considered the submissions made by the learned Counsel. At the outset, it needs to be stated that generally speaking, the Courts in this country, including this Court, adopt a liberal approach in considering the application for condonation of delay on the ground of sufficient cause u/s 5 of the Limitation Act. This principle is well-settled and has been set out succinctly in the case of Collector, Land Acquisition, Anantnag & Ors. V. Katiji & Ors.

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of

the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.

29. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay u/s 5 of the Limitation Act, the courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections cannot and should not form the basis of exercising discretionary powers.

10. In the decision reported in [Vedabai @ Vaijayanatabai Baburao Pateil Vs. Shantaram Baburao Patil and Others](#), the Hon"ble Supreme Court although professed a pragmatic approach to be taken in such cases but sounded a note of caution against becoming too liberal as one could find in the said judgment relevant portion whereof is reproduced hereinbelow:-

A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. Whereas in the former case the consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case, no such consideration may arise and such a case deserves a liberal approach. No hard-and-fast rule can be laid down in this regard. The Court also to exercise the discretion on the facts of each case keeping in mind that in construing the expression "sufficient cause", the principle of advancing substantial justice is of prime importance.

11. In [Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai](#), the same principle was reiterated in Paragraphs 12 and 18 are reproduced hereinbelow:-

12. We have considered the respective arguments/submissions and carefully scrutinized the record. The law of limitation is founded on public policy. The Limitation Act, 1963 has not been enacted with the object of destroying the rights of the parties but to ensure that they approach the Court for vindication of their rights without unreasonable delay. The idea underlying the concept of limitation is that every remedy should remain alive only till the expiry of the period fixed by the Legislature. At the same time, the Courts are empowered to condone the delay provided that sufficient cause is shown by the applicant for not availing the remedy within the prescribed period of limitation. The expression "sufficient cause" used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable

the Courts to apply the law in a meaningful manner which serve the ends of justice. No hard and fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years this Court has advocated that a liberal approach should be adopted in such matters so that substantive rights of the parties are not defeated merely because of delay.

18. What needs to be emphasised is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power u/s 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and/or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest.

12. In [Oriental Aroma Chemical Industries Ltd. Vs. Gujarat Industrial Development Corporation and Another](#), the Hon"ble Supreme Court was considering the appeal filed by the State. While Hon"ble Supreme Court repeated that no hard-and-fast rule could be laid down in deciding such cases, but remanded the matter back to the courts to ascertain, if sufficient cause is made out as would appear from Paragraph 8 of the said Judgment which reads as follows:-

8. The law of limitation is founded on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time. The expression "sufficient cause" employed in Section 5 of the Indian Limitation Act, 1963 and similar other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which subserves the ends of justice. Although, no had-and-fast

rule can be laid down in dealing with the applications for condonation of delay, this Court has justifiably advocated adoption of a liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate- [Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others](#), [N. Balakrishnan Vs. M. Krishnamurthy](#), and [Vedabai @ Vijayanatabai Baburao Patil Vs. Shantaram Baburao Patil and Others](#), . In dealing with the applications for condonation of delay filed on behalf of the State and its agencies/instrumentalities this Court has, while emphasizing that same yardstick should be applied for deciding the applications for condonation of delay filed by the private individuals and the State, observed that certain amount of latitude is not impermissible in the latter case because the State represents collective cause of the community and the decisions are taken by the officers/agencies at a slow pace and encumbered process of pushing the files from table to table consumes considerable time cause delay- [G. Ramegowda, Major and Ors Vs. Special Land Acquisition Officer, Bangalore, State of Haryana Vs. Chandra Mani and others](#), , [State of U. P. and others Vs. Harish Chandra and others](#), , [State of Bihar Vs. Ratan Lal Sahu and Others](#), , [State of Nagaland Vs. Lipok AO and Others](#), , and [State \(NCT of Delhi\) Vs. Ahmed Jaan](#), .

(Emphasis supplied)

13. In a fairly recent decision, namely, Office of the Chief PMG (supra), the Hon"ble Supreme Court refused to condone the delay of 427 days in preferring the SLP by the Office of the Chief PMG and observed as follows:-

Condonation of delay is an exception and should not be used as an anticipated benefit for Government departments. The law shelters everyone under the same light and should not be swayed for the benefit of a few.

14. The Hon"ble Supreme Court also relied upon Pundlik Jalam Patil (Dead) by [Pundlik Jalam Patil \(D\) by Lrs. Vs. Exe. Eng. Jalgaon Medium Project and Another](#), in which there was a delay of 1724 days in filing appeals before the Hon"ble Court. In Paragraph 17 of the said report it was held as follows:-

17. The applicant having set the machinery in motion cannot abandon it to resume it after number of years because the authority with whom it had entered into correspondence did not heed to its request to file appeals. The question is: Can the respondent applicant in this case take advantage of its negligence, after a lapse of number of years, of the decision of the Government? It knew the exact grounds on which appeals could have been preferred. The law will presume that it knew of its right to file appeal against the award. Everybody is presumed to know law. It was its duty to prefer appeals before the Court for consideration which it did not. There is no explanation forthcoming in this regard. The evidence on record suggests neglect of its own right for long time in preferring appeals. The court cannot enquire into belated and state claims on the ground of equity. Delay defeats equity. The court helps those who are vigilant and "do not slumber over their rights".

15. Even in the earlier decisions it would appear that the Court has made a distinction between class of litigants, namely, the socio-economic condition of the litigant and directed the Court to adopt a justice oriented approach dictated by the uppermost consideration that ordinarily a litigant should not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disintitiled himself from seeking the benefit of condonation from the Court [S. Amarjit Singh Kalra \(dead\) by Lrs. and Others and Smt. Ram Piari \(dead\) by L.Rs. and Others Vs. Smt. Pramod Gupta \(dead\) by Lrs. and Others, \).](#)

16. In Lanka Venkateswarlu (supra), the Hon"ble Supreme Court considered the case of [Balwant Singh \(Dead\) Vs. Jagdish Singh and Others,](#) and quoted paragraph 26 of the report which is reproduced hereinbelow:-

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of party to arise. The se principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly as a result of negligence, default or inaction of that party justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.

(Emphasis supplied)

17. The petitioners have participated in the proceeding. The impugned order and certificate was issued upon contest. The petitioner cannot take any plea of lack of knowledge of the order recording compromise between ICICI Bank and Oriental Bank of Commerce and the certificate ultimately issued by the Tribunal on 6th August, 2003. The explanation given for approaching the Court after seven and half years does not inspire the confidence of this Court. The Court even on an equitable consideration on these facts cannot exercise a discretion in favour of the petitioner. The order under challenge is a discretionary order and unless it is found that such discretion has been exercised capriciously and arbitrarily, this Court should not interfere with such discretion exercised by the Appellate Tribunal.

18. In view thereof, this Court finds no infirmity in the order passed by the learned DRAT.

19. The revisional application stands dismissed. However, there shall be no order as to cost.

20. The urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.

Soumen Sen, J.

Later:

After the judgment is delivered, the learned advocate for the petitioner prays for stay of operation of the order. Such prayer is considered and rejected.