
(2008) 04 BOM CK 0011
In the Bombay High Court
Case No : Writ Petition No. 447 of 2007

Antonio Francisco De Silva

APPELLANT

Vs

Mrs. Beatriz Noronha Cabral and Others

RESPONDENT

Date of Decision : 04-04-2008

Acts Referred:

Arbitration Act, 1940 — Section 30
Limitation Act, 1963 — Section 5

Citation : (2008) 04 BOM CK 0011

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : V.R. Tamba, for the Appellant; Sudin Usgaonkar with Ms. Gayatri Kale, Advocates for the Respondent No. 3, for the Respondent

Final Decision : Dismissed

Judgement

S.A. Bobde, J.—The petitioner questions the order of the Administrative Tribunal, Goa dated 5.7.2004 by which the respondent's application for restoration of his revision application has been allowed after condoning the delay of 140 days. The respondent - Landlord had preferred a revision which was pending before the Administrative Tribunal Goa. On 11.12.2002, the Advocate was to remain present for filing the written submission. He, however, did not attend the Tribunal on that day and the Tribunal, therefore, dismissed the revision in default. The Advocate accepted that he remained absent on that day. In the application for restoration filed by the respondent, the circumstances in which the matter was dismissed in default are set out. Further all the circumstances in which the application could not have been filed within time have also been set out. In short, the reason for delay given by the respondent was that in the first half of year 2002 when the matter was dismissed there was no permanent judge in the Tribunal and in November 2002, the respondent was informed that a Judge was appointed and one hearing had taken place and that the second hearing was fixed in second week of December on which day written submission would be filed. Then thereafter, the applicant who had duly instructed the Advocate did not hear the

matter till he received the notice from the Talathi in the second week of April 2002 that the names of the applicant tenant has been entered as occupant and, therefore, the application for restoration was being moved. It is settled law that the litigants should not be made to suffer on account of fault of his Advocate. The application for restoration was accompanied by affidavits of two Advocates in support of the circumstances in which the matter was dismissed as well as in which the application for restoration was presented after the delay of about 140 days. Having regard to these circumstances, the Tribunal considered the application for restoration as also considered the question whether the application for restoration should be granted and also whether there was sufficient cause for not preferring the application in time. The Tribunal came to a specific conclusion that the respondents had no knowledge of the dismissal of the revision and in the circumstances, there was no negligence on their part in moving for restoration application. He, therefore, allowed the application for restoration by specifically condoning the delay.

2. Mr. Tamba, the learned Counsel for the petitioner submitted that there being no separate application for condonation of delay, apart from the application for restoration, the Tribunal committed a serious error of law apparent on the face of record in condoning the delay. He relied upon the judgment of a learned Single Judge of this Court in the case of Ballumal A. Jaisingh Vs. J.J. Builders and Others, . Now it is clear that the respondent has not made an application for condonation of delay, which is separate from the application for restoration. This does not ipso facto mean that there is no application for condonation of delay in the sense that the circumstances in which the delay took place have not been brought on record. The question really is, therefore, whether an application for condonation of delay ought to have been separately filed even where all the circumstances in which the delay has occurred, have been brought before the Court and the foundation for condonation of delay has been laid. Section 5 of the Limitation Act, 1963 reads thus :

Extension of prescribed period in certain cases - Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation - The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

3. The Section clearly provides that an appeal or application may be admitted after the prescribed period, if the party satisfies the Court that he had sufficient cause for not preferring the appeal or making an application within such period. The basic condition for admitting the delayed appeal or application is that the party must satisfy the Court that he had sufficient cause for not preferring the appeal or making an application within the period of limitation. The basic

requirement of the section is that the party seeking condonation of delay must satisfy the Court that there is sufficient cause for such condonation. It does not prescribe a separate application for condonation of delay.

4. In the present case the respondent applied for restoration of his revision which was dismissed in default. In the application he clearly stated the circumstances in which the revision was dismissed in default and the circumstances because of which he could not file the application within the time prescribed by law. The Tribunal also enquired into and applied its mind to the existence of sufficient cause for condoning the delay and came to the conclusion that such sufficient cause existed and made a specific order for condonation of delay. In such situation merely because the prayer for condonation was not made in writing, it cannot be said that there was no application for condonation of delay and the Tribunal could not have come to the conclusion that there was a sufficient cause for condoning the delay. Indeed, it is settled law that the Court must pay heed to the substance of the matter and not merely to the form or technicalities of procedure.

5. Mr. Usgaonkar, the learned Counsel for the respondent relied upon the decision of Kerala High Court in the case of Unniraman Vs. Padmanabhan and Another, and in the case of Suresh Kumar and Others Vs. Firm Kurban Hussain Taiyab Ali and Others, . Both the High Courts had come to the conclusion that a formal application for condonation of delay is not required if the facts presented before the Court satisfy the judicial conscience of the Court that the applicant was prevented by sufficient cause in bringing the proceedings within limitation. It appears that three other High Courts i.e. Orissa High Court, in the case of Gadachandi Thakurani and Others Vs. Udi Barik and Others, , Patna High Court in the case of Mosmat Ram Kali Kuer and Others Vs. Indradeo Choudhary and Another, and Gujarat High Court in the case of Markland Pvt. Ltd. and Others Vs. State of Gujarat, , are of the same view. I am in respectful agreement with the views of these High Court. Mr. Usgaonkar, the learned Counsel for the respondent also relied upon the decision of Supreme Court in the case of Davinder Pal Sehgal and Another Vs. Partap Steel Rolling Mills Pvt. Ltd. and Others, , In that case in the application for restoration all the relevant facts not only to show that the plaintiff had sufficient cause for non-appearance but also to show sufficient cause for condonation of delay in filing the restoration application were stated and in the application for condonation of delay it was merely stated that the facts stated in the restoration application may be taken into consideration for condonation of delay in filing the restoration application. The trial Court had allowed the restoration application and the High Court reversed the decision of the trial Court. While reversing the High Court's decision and allowing the application, the Supreme Court has held that though no separate order condoning the delay passed, it cannot be said that the order of the restoration has been passed without condoning the delay in filing the restoration application. In the present case there is an order for condonation of delay though no separate prayer in writing. What must therefore be construed as essential is that

the facts which constitute sufficient cause for condoning delay should be presented to the Court and the Court should condone the delay either expressly or impliedly by restoring or admitting the appeal or application.

6. It is, therefore, clear that in the present case the order of the Tribunal below does not suffer from any error of the law apparent on the face of the record in allowing the restoration of the respondent's revision and condoning the delay since the foundation for the condonation of delay which was condoned was laid in the application for restoration. I am of the view that it is of no consequence that a separate application for condonation of delay was not preferred and a prayer in writing for condonation of delay was not made.

7. Mr. Tamba, the learned Counsel for the petitioner relied upon the judgment of the learned Single Judge of this Court in the case of Ballumal A. Jaisingh V. M/s. J.J. Builders and others as observed earlier. In that matter, the learned Single Judge, (Mr. Palshikar, J.) has held that the Court can get jurisdiction to hear the matter barred by limitation only an application for condonation of delay is made and in the absence of such application, the Court will have no power to condone the delay. The facts of that case are different from the facts here. The proceedings which were delayed in that case were an objection to the award U/s.30 of the Arbitration Act, 1940. It appears that no facts demonstrating sufficient cause for condonation of delay were brought before the Court either in the objection or by way of a separate application. Thus, in effect no foundation was laid for condoning the delay. The judgment was rendered in the circumstances which are different from the circumstances in this case. In this view of the matter, I see no merit in the challenge to the impugned order. The writ petition is, therefore, dismissed. There shall be no order as to costs.