

(2018) 09 GAU CK 0001

In the Gauhati High Court

Case No : Interlocutory Appellation (Civil) 1996 of 2018

Employees State Insurance Corporation Regional Office And 2 Ors

 V_S

M/S Hindustan Coca Cola Beverages Pvt Ltd And Anr. RESPONDENT

Date of Decision : 03-09-2018

Acts Referred:

Limitation Act, 1963 — Section 5

Employees' State Insurance Act, 1948 — Section 45-A(A), 45A, 75, 77, 82, 82(3)

Constitution of India, 1950 — Article 226

Citation : (2018) 09 GAU CK 0001

Hon'ble Judges : KALYAN RAI SURANA, J

Bench : Single Bench

Advocate : K. K. Nandi, K. K. S. Roy, P. Kalita, Satyen Sarma, S. K. Deka

Final Decision : Dismissed

Judgement

1. Heard Mr. K.K. Nandi, the learned advocate for the applicants and Mr. Satyen Sarma, the learned advocate for the respondents.

2. By this application under Section 5 of the Limitation Act, 1963 the applicants i.e. the Employeesâ?? State Insurance Corpn. (â??ESICâ?? for

short) and its 2 (two) officials have prayed for condoning the delay of 101 days beyond the period of limitation in filing the connected appeal, which

has been filed under Section 82 of the Employees' State Insurance Act, 1948.

3. The learned advocate for the applicants has referred to the statements made in this application and submits that the judgment in ESI Case No.

3/2014 was delivered by the Employees State Insurance Court (hereinafter referred to as the "learned ESI Court") on 07.10.2016. The certified

copy of the impugned order was applied on 20.10.2016 and received by the conducting advocate on 26.10.2016. The same was forwarded by the

conducting advocate to the applicants by letter dated 26.10.2016 (Annexure-1), which was received by the Regional Office of the applicants on

01.11.2016. The applicants decided to prefer an appeal and, as such, the applicant No.1 i.e. ESIC by letter dated 10.11.2016 (Annexure-2), send some relevant papers along with the judgment to their advocates in High Court. The advocates required some additional papers and documents for preparing and filing the appeal, for which request was made by letter dated 02.12.2016 (mentioned as Annexure-3). The additional documents were provided on

02.12.2016. However, the advocate for the applicants had gone to Kolkata from 23.12.2016 to 13.01.2017 for the treatment of his family member.

The advocates sought for certain clarifications, and having received them, the learned advocates took a few days time for preparing and filing the

connected appeal. The learned advocate for the applicants submits that in the said manner, there was an inadvertent delay of 101 days in filing the

connected appeal. It was submitted that as the applicants are Govt. of India concern, they are required to follow some official procedures, which are

time consuming. It is submitted that there was a very good case on merit and, as such, the delay was liable to be condoned as huge public money is

involved in this case. In support of his contentions, the learned advocate for the applicants has placed reliance on the following cases, viz., (i) (2017)

12 SCC 840; (ii) 2007 (3) GLT 526.

4. The learned advocate for the respondents has strenuously made his submissions to oppose the prayer for condoning the delay. His submissions are as follows:-

a. It is submitted that the Courts are not permitted to have two different yard-stick for the private persons and the government agencies while dealing with the prayer for condonation of delay.

b. Willful and deliberate non- compliance of orders passed by this Court as well as by ESI Court:

i. By referring to the documents appended to the connected Memo of Appeal, it is submitted that in the present case, challenging the ESIC orders

dated 09.07.2010, 06.09.2010 and 13.09.2010, the respondents No.1 and 2 had filed a writ petition before this Court under Article 226 of the

Constitution of India, which was registered as W.P.(C) No. 5824/2010. While disposing of the said writ petition, as required under Section 45-A(A) of

the ESI Act, this Court by order dated 01.11.2011, had directed the respondents to deposit 25% of the amount determined by the Deputy Director,

ESIC vide order dated 09.07.2010 under Section 45-A of the Act either in cash or by way of bank draft with the applicant within 6 (six) weeks, and it

was provided that if the amount assessed is found to be lower than the amount deposited by the respondents herein, it was provided that pursuant to

the said order passed on 01.11.2011, the balance of the amount shall be refunded to the respondents together with the interest at the rate at which

moneys are lent or advanced by nationalized banks in relation to commercial transaction, further providing that such refund was to be made within one

month from the date of passing of the order by the respondent No.1 Corporation.

ii. It is submitted that the demand against the respondents was maintained, as such, the respondents had filed an application under Section 75 read with

Section 77 of ESI Act to decide the determination of contribution, which was registered as ESI Case No. 3/2014, which was allowed by the impugned

judgment.

iii. It is submitted that in the impugned judgment, the learned ESI Court, in paragraph 17 of the said order, had directed the refund of Rs.11,21,957/-

together with interest as per order of this Court dated 01.11.2011 in W.P. (C) No. 5824/2010.

iv. It is submitted that despite the judgment dated 01.11.2011 passed by this Court in W.P.(C) No. 5824/2010 and judgment dated 07.10.2016 passed

by the learned ESI Court, the applicants have not refunded the sum of Rs.11,21,957/- deposited by them pursuant to the judgment rendered in W.P.(C)

No. 5824/2010.

v. It is submitted that after the ESI Case No. 3/2014 was allowed, the respondent No.1 by a letter dated 31.10.2016 (Annexure-B to the Affidavit-in-

opposition to this application), made a request for refund of money, which though served on the applicant No.1 at their Regional Office at Guwahati on

03.11.2016, remained unheeded.

vi. Hence, by serving advocate's notice dated 23.05.2018 (Annexure-C to the Affidavit- in- opposition to this application), the respondents had

called upon the applicant No.2 i.e. the Regional Director, ESIC to refund the sum of Rs.11,21,957/- with interest in terms of judgment of this Court in

W.P. (C) No. 5824/2010 and judgment dated 07.10.2016 in ESI Case No. 3/2014.

vii. It is submitted that thereafter on 07.11.2016, the respondents had lodged a caveat in respect of judgment dated 07.10.2016 in ESI Case No.

3/2014, and towards notice, copies of caveat was sent to all the three applicants.

viii. Though this application and the connected appeal was filed on 18.03.2017, the applicants showed no urgency to move this application and that this

application was listed on 06.06.2018 and notice was issued.

ix. Therefore, despite the two judgments, one by this Court in W.P.(C) No. 5824/2010 and the other by the impugned order in connected appeal,

passed by the learned ESI Court, the applicants did not comply with the directions contained therein to refund the money to the respondents, despite

having knowledge to make refund within one month from the date of adjudication of the claim.

x. Hence, it is submitted that for disobedience of the two said judgments, the applicants may not be heard unless they purge of their contempt.

c. Moreover, it is submitted that the applicants are committing contempt of the judicial orders, and in the process, they are also enjoying the money of

the respondents for about 6 (six) years, by which time, a huge arrear commercial lending rate of interest has accrued on the said sum of

Rs.11,21,957/-.

d. It is submitted that though the applicants are instrumentalities of the State and part of the Union Government, the applicants have suppressed

material facts. The applicants have not disclosed the receipt of (i) letter dated 31.10.2016 (Annexure-B to the Affidavit-in- opposition to this

application), (ii) advocate's notice dated 23.05.2018 (Annexure-C to the Affidavit-in- opposition to this application), and (iii) caveat in the present

application. It is submitted that by not disclosing the said facts, an attempt has been made to suppress material facts that apart from letter received

from the advocate of the applicant, the applicants were otherwise aware of the impugned judgment and their obligation to refund the sum of

Rs.11,21,957/- with interest to the respondent No.1. Hence, it is submitted that if the applicants have not come with clean hands, this Court ought not

to condone the delay.

e. It is submitted that despite receipt of the said three modes of communication about the judgment impugned in the connected appeal, the applicants

had not file the appeal on time and moved in their leisurely pace.

f. It is submitted that in this application, it is mentioned that there is a document annexed as Annexure-3, but the same is not on record, which shows the casual manner in which this application has been filed. However, it is submitted that as it would not reflect good on the learned advocate filing the petition, this ground though mentioned is not seriously pressed at this juncture by reserving the right of the respondent to re-agitate the same, if an occasion demands.

g. Similarly, it is submitted that from 23.12.2016 to 13.01.2017, when the learned advocate for the applicants had gone to Kolkata for treatment of his family member, the advocates for the respondents are not inclined to object as it was on account of the learned advocate at this juncture, reserving the right of the respondents to re-agitate the issue again, if an occasion so demands, but it is submitted that from 13.01.2017, date of return of advocate to station to 18.03.2017, the date of filing of the accompanying appeal, there is no explanation at all. In this regard, it is submitted that when the applicants are aware that Section 82(3) provides for a 60 (sixty) day's time period for filing appeal, the lack of any explanation of the causes of delay for the period from 13.01.2017 to 18.03.2017 cannot be condoned, if there is no explanation for the causes of delay during the said period.

h. In support of his submissions, the learned advocate for the respondents has relied on the following cases:-

- i. Mahanagar Telephone Nigam Ltd. Vs. State of Maharashtra & Ors., (2013) 9 SCC 92;
- ii. Union of India & Ors. Vs. Nripen Sarma, (2013) 4 SCC 57;
- iii. Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai, (2012) 5 SCC 157: AIR 2012 SC 1629;
- iv. Postmaster General & Ors. Vs. Living Media India Ltd. & Anr., (2012) 3 SCC 563;
- v. D. Gopinathan Pillai Vs. State of Kerala, (2007) 2 SCC 322;
- vi. The State of Assam Vs. Bibekananda Talukdar, I.A.(C) No. 160/2017, decided by the Honâble Division Bench of this Court on 27.01.2017;
- vii. Fulchand Kurmi Vs. Chandrabati Kurmi, (2008) 4 GLR 629 (DB).

5. At the outset, having perused the cases cited by the learned advocates for the parties, it is seen that there are many cases where Courts have condoned even several years of delay and there are many cases, where even a

few days delay has been held to be fatal. Therefore, each case must be evaluated on its own unique facts and there can be no straight jacket formula, which can be applied at random in all cases equally.

6. In the present case in hand, it is seen that by judgment dated 01.11.2011 passed by this Court in W.P.(C) No. 5824/2010 and judgment dated

07.10.2016 passed by the learned ESI Court, the applicants knew since the time of filing of the said ESI Case No. 3/2014, that if the matter is decided

against them, the applicants would have to refund the sum of Rs.11,21,957/- deposited by the respondents pursuant to the judgment dated 01.11.2011,

rendered by this Court in W.P.(C) No. 5824/2010. Moreover, by virtue of (i) letter dated 31.10.2016 (Annexure-B to the Affidavit-in- opposition to

this application), (ii) advocate's notice dated 23.05.2018 (Annexure-C to the Affidavit-in- opposition to this application), and (iii) caveat in the

present application, it is not in dispute that the applicants are aware of their requirement to comply with the judgment dated 01.11.2011, rendered by

this Court in W.P.(C) No. 5824/2010, i.e. to refund the sum of Rs.11,21,957/- to the respondents. Thus, in the opinion of this Court, this is not a case

where public exchequer would be at a loss if delay is not condoned, but this case involves refund of demand, which has been negated by the learned

trial Court.

7. The applicants have made the following statement in this application â?" â??5. That having received papers and documents on 19.01.2017 certain

additional clarifications was sought, and after having received the said clarifications the learned counsel took few days time for preparation and filing

the appeal and as such there is a delay of 101 days in filing the appeal.â? From the affidavit filed in support of this application, it is seen that the

statements made in paragraph 5 of this application is stated to be statement which are â??matters of recordâ?. However, no record in support of the

said statement is found to be annexed either in this application or in the connected Memo of Appeal.

8. Hence, this Court is of the considered opinion that the delay has not been properly explained. It is seen that the Honâ??ble Supreme Court in the

case of D. Gopinath Pillai (supra), had held that when delay is not satisfactorily and convincingly explained, the Court cannot condone the delay only

on sympathetic ground. It was further held that it is well considered principle of

law that delay cannot be condoned without assigning any reasonable, satisfactory, sufficient and proper reason. It is seen that the said ratio was followed by the Honâ??ble Division Bench of this Court in the case of Fulchand Kurmi (supra).

9. It is also observed on a perusal of the records that the Filing Assistant of this Court had accepted the filing of the accompanying appeal on

18.03.2017. The Stamp Reporter of this Court had made an endorsement on 27.03.2017 that Caveat No. 1531/16 was there. However, the copy of

the accompanying Memo of Appeal as well as a copy of this application was served on the learned advocate for the respondents- caveators on

01.06.2018. Thus, the appeal remained defective for about 15 months from 23.07.2017, the date of report by the Stamp Reporter. In this regard,

although this Court is not inclined to make any adverse remark on the conduct of the applicants, but this appears to be high time, when the practice of

leaving cases lying defective in the Registry for 15 months, as in this case, must be sternly dealt with equally stern measures.

10. Thus, having found that the delay has not been satisfactorily explained for the period from 13.01.2017 to 18.03.2017 as indicated herein before, the

two cases cited by the learned advocate for the applicants is distinguishable on facts. Firstly, because the applicants were aware that by virtue of

judgment dated 01.11.2011, rendered by this Court in W.P.(C) No. 5824/2010, the applicants were aware of their liability to refund money to the

applicants. Secondly, by virtue of (i) letter dated 31.10.2016 (Annexure-B to the Affidavit-in-opposition to this application), (ii) advocateâ??s notice

dated 23.05.2018 (Annexure-C to the Affidavit-in- opposition to this application), and (iii) caveat in the present application, it is not in dispute that the

applicants are aware of their requirement to comply with the judgment dated 01.11.2011, rendered by this Court in W.P.(C) No. 5824/2010, i.e. to

refund the sum of Rs.11,21,957/- to the respondents. Thirdly, by the said three communications, the applicants were aware of the judgment dated

07.10.2016 passed by the learned ESI Court in ESI Case No. 3/2014. Fifthly, ESI Act, 1948 is solely for the enforcement by the applicants, i.e. ESIC,

yet they have disregarded the mandate of Section 82(3) of the said ESI Act, 1948 as if the applicants have taken it for granted that on their asking any

amount of delay would always be condoned, even if no explanation is given.

11. This Court is conscious of the decision rendered by the Honâ??ble Supreme Court in many cases that delay condonation petition must be dealt

with pedantic manner and there must be liberal approach while dealing with application for condonation of delay. Thus, this Court does not want each

and every daysâ?? delay to be explained, but, by any extent, the said principle cannot be stretched to mean that no delay is required to be explained

for the period from 13.01.2017 (when the learned advocate for the applicants returned to Guwahati) and/or from 19.01.2017 to 18.03.2017, as

projected in paragraph 5 of this application, quoted herein before, when the applicants are aware that the period of limitation to file appeal is 60 days.

12. Therefore, in the considered opinion of this Court, as the delay from 19.01.2017 to 18.03.2017 is not borne by records, in terms of affidavit sworn

by the applicants, this Court has no hesitation to hold that the applicants have not pleaded any reason for delay from 19.01.2017 to 18.03.2017. Thus,

this application fails and the same stands dismissed. As a natural corollary, the connected appeal, being MFA No. 73/2018 also stands dismissed.