

(2014) 03 J&K CK 0009

In the Jammu And Kashmir High Court

Case No : C.O.D. (LPA) No. 313 of 2013, L.P.A. No. 192 of 2013 and C.M.P. No. 314 of 2013

State of Jammu & Kashmir and Others

APPELLANT

Vs

Abdul Hamid Khan and Others

RESPONDENT

Date of Decision : 17-03-2014

Acts Referred:

Citation : (2014) 03 J&K CK 0009

Hon'ble Judges : M.M. Kumar, C.J;Hasnain Massodi, J

Bench : Division Bench

Advocate : J.A. Kawoosa, A.A.G, for the Appellant; G.A. Lone for the Respondents 1 to 14 and Mr. S.A. Makroo for the Respondents 19, 22, 33, 44 and 57, for the Respondent

Final Decision : Allowed

Judgement

1. The State of Jammu and Kashmir and its functionaries have filed an application with a prayer for condoning the delay of two years and 166 days

in filing the accompanying Letters Patent Appeal. It is appropriate to mention that learned writ Court delivered a judgment dated 18.03.2011 in

SWP No. 4178/1997 (Abdul Hamid Khan & others v. State of J & K and others). After the judgment, the Service Selection Board (for brevity

Board) issued an order dated 18.06.2011, expressing its inability to make the recommendations for appointment in favour of the writ petitioners on

the ground that the writ Court did not quash the selection of any candidate which might have resulted in occurrence of vacancy(ies) under Open

Merit category, so as to recommend the names of the writ petitioners. It is further stated by the Board that no post under the Open Merit category

had remained unfilled. Moreover, after the year 1997, the Board has made

selections in various districts including Anantnag District and has furnished the selection list to the indenting department. In any case, the Board has become functus officio and did not have the jurisdiction to make the recommendations over and above the referred posts in any category. What is seen from the pleadings is that the matter remained pending between June, 2011 to October, 2011, and was examined at various levels in the department. Finally the department of Youth Services and Sports decided that it was indenting department and no selection in favour of writ petitioners-respondents herein was received from the Board, therefore, the question of appointing the writ petitioners was outside their jurisdiction. It led to the filing of contempt petition bearing Cont. No. 535/2011, and direction was issued to the appellants to comply with the judgment and order dated 18.03.2011.

2. The applicants have made reference to various orders issued by the contempt court. It was on 27th March, 2013, that statement of facts was filed expressing the reason influencing the decision of the appellants for not appointing the writ petitioners-private respondents. It is further contended that the matter was taken up with the Law, Justice and Parliamentary Affairs Department on 05th of May, 2013, seeking permission/approval to file the appeal against the impugned judgment, which was declined on 27.05.2013. Further justification has been furnished stating that the Government Advocate representing the Department was changed on 26.07.2013, resulting in communication gap and the officers of the State could not present themselves in the Court in person on 23.08.2013, when the case was fixed in the Court, which constrained the contempt court to impose the costs of rupees thirty thousand with a further direction to the Secretary to the Government to remain present in person on 09.09.2013. What is seen further is that the appellants filed an application for recalling of the order dated 23.08.2013 by deleting the costs imposed on them. Thereafter, on 04.09.2013 a memorandum was presented to the State Cabinet, and a direction was issued to the functionaries of the State to examine the issue in detail. After detailed examination, the permission to file the Letters Patent Appeal was accorded on 29.09.2013. The appellants then immediately contacted the Senior Additional Advocate General to file the Letters Patent Appeal who sought

reasons for delay and asked for complete record of rules for drafting the memorandum of appeal. The period of two weeks was consumed by the appellant-department to collect the record and prepare the ground for seeking condonation of delay in filing the Letters Patent Appeal. It is the positive case of the appellants that it was on the aforesaid reasons that the matter could not be pursued vigorously and also on account of ongoing session of the Legislative Assembly. The application at hand is supported by an affidavit of Secretary to Government, Technical Education/Youth Services and Sports Department, Shri Parvez Ahmad Malik.

3. In response to notice of motion, objections have been filed by the writ petitioners-respondents opposing the application seeking condonation of huge delay. On their behalf, Mr. G.A. Lone, learned appearing counsel argued that there is no cause much less sufficient cause shown by the appellants justifying the delay. According to the learned counsel, as a matter of fact the judgment was well within the knowledge of the appellants and the Law Department has rightly declined the possibility of filing of any Letters Patent Appeal. It is contended that on 27.05.2013, it has been insisted that once the opinion has been expressed by the Law Department, there was no possibility of re-examination of the matter and granting permission to file the Letters Patent Appeal on 20.09.2013.

4. Our attention has been drawn to the various orders passed by this Court from time to time in Contempt Petition bearing Cont. 535/2011 to bring home the point that the present appeal is in fact a counterblast to the contempt proceedings. Reference has also been made to the noting on the file of the Technical Education Department obtained by the writ petitioners through Right to Information Act (Annexure R3 to the objections filed by respondents 1 to 14) and the Government Order No. 146-Edu. (Tech) of 2012 dated 23.08.2012 (Annexure R4 to the objections filed by respondents 1 to 14). Likewise, separate objections have been filed by Mr. S.A. Makroo, learned counsel for respondents 19, 22, 33, 44 & 57, reiterating the stand taken by the learned appearing counsel for respondents 1 to 14, Mr. G.A. Lone.

5. We have heard learned counsel for the parties at length and considered the matter.

6. It is true that in order to succeed in securing the relief of condonation of delay

an applicant has to show sufficient cause irrespective of the fact as to whether the applicant belongs to a Government Department or it is a case of private citizen. In either case the applicant has to be dealt with even handedly. In that regard, reliance has been rightly placed by Mr. G.A. Lone, on the judgments of Hon'ble the Supreme Court rendered in *Amlendu Kumar Bera and Others Vs. The State of West Bengal*, ; *Office of The Chief Post Master General and Others Vs. Living Media India Ltd.* and *Another*, . However, it is equally true that right of one appeal should ordinarily be provided to a litigant so as to crease out any error which might have crept in the view taken by the first court. To err is human and to provide an opportunity to rectify an error, if there is any, is part of the administration of justice. It is also appropriate to mention that the order passed by the contempt court on 29.10.2013, was subject matter of challenge before Hon'ble the Supreme Court in SLP (Civil) No. 37768/2013 and the same has been decided on 03.01.2014. It would be profitable to extract the observations of their Lordships of the Supreme Court which are set out below in extenso:

The petitioner has preferred this appeal leave petition against the order dated 29.10.2013 passed by the High Court in Cont. No. 535/2011 in

SWP No. 4178/1997 whereby it has directed the Registry to frame charges against the petitioner.

It has been stated in this petition that the aforesaid contempt petition was filed for disobedience of the order dated 18.03.2011 passed by the

learned Single Judge of the High Court in SWP No. 4178/1107.

It has also been stated that a Letters Patent Appeal has been filed against the aforesaid order in which notice has been issued on the condonation

of delay.

In the facts of the present case, we are of the opinion that the learned Judge in seisin of the contempt petition shall proceed with the matter only

after final disposal of the Letters Patent Appeal.

The SLP stands disposed of with the aforesaid observations.

7. A perusal of the aforesaid order of their Lordships of the Hon'ble Supreme Court takes notice of the fact that the Letters Patent Appeal was

pending consideration, where the notice in the application seeking condonation of delay had been issued. A direction has been issued that

contempt proceedings would not be taken up till final disposal of the Letters Patent Appeal.

8. It has also been repeatedly observed by Hon'ble the Supreme Court that in cases where delay has not resulted in accrual of third party rights,

the opposite party could be compensated by awarding the costs. In that regard, reliance may be placed on the observations made by the Hon'ble

Supreme Court in *Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai*, Referring to the earlier judgments of the Supreme Court in

Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, and *State of Nagaland Vs. Lipok AO and Others*, their Lordships

have observed that expression sufficient cause is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves

the ends of justice. The Courts are expected to take liberal approach in such matters where refusal to condone delay is likely to result in a

meritorious matter being thrown out at the very threshold.

9. The discussion in the preceding paragraphs would show that in cases of first appeal the approach of the Court in condoning the delay should be

liberal as the right of first appeal is accepted in all jurisdictions. The applicant in such cases can be compensated by imposing payment of costs.

10. We are not deliberately entering into the merits of the controversy lest it prejudices the mind of the appellate court. Therefore, we are inclined

to condone the delay and grant hearing to the appellants on the merits of the controversy.

11. In the aforementioned backdrop, the application succeeds and is allowed. Delay of two years and 166 days in filing the Letters Patent Appeal

is hereby condoned. However, the appellants are saddled with the costs of rupees one thousand payable to each of the writ petitioners-

respondents 1 to 14 and 19, 22, 33, 44 & 57.

12. Registry shall list the appeal alongwith connected CMPs, if any, for hearing on merits of the controversy, as per the roster in the week

following next. COD (LPA) No. 313/2013 is disposed of.