

**(1991) 07 CAL CK 0029**  
**In the Calcutta High Court**  
**Case No : FMAT No. 671 of 1985**

State of West Bengal and others

APPELLANT

Vs

Nripendra Nath Banerjee and others

RESPONDENT

**Date of Decision :** 26-07-1991

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 3A, Order 41 Rule 5, 141  
Constitution of India, 1950 — Article 225, 226  
Limitation (Amendment) Act, 1963 — Article 137, 3, 5  
Limitation Act, 1908 — Article 181  
Writ Proceedings Rules, 1977 — Rule 53

**Citation :** AIR 1992 Cal 179 : 96 CWN 209

**Hon'ble Judges :** Ajoy Nath Ray, J; A.M. Bhattacharjee, J

**Bench :** Division Bench

**Advocate :** Mr. D. Bera, for the Appellant; Mr. G.C. Mukherjee, for the Respondent

## **Judgement**

A.M. Bhattacharjee, J.—The appeal has been filed by the State about 80 days after the period prescribed. But the application for extension of time u/s 5 of the Limitation Act and also the application for stay of the operation of the judgment have been filed about 6 years-after. This, by itself, should, in my view, be a very important consideration in declining the stay prayed for, even if we find sufficient cause to condone the delay in presenting the appeal. If the State could wait for so many years without taking any step towards admission of the appeal on condonation of delay and, therefore, without any order of stay, there is nothing on record to show that it would suffer any irreparable injury without any curial interdiction till the hearing of the appeal, even if we admit the appeal on condonation of the delay.

2. Be it, however, noted that the learned counsel for the Respondent has not disputed that the State appellant can be regarded to have made out sufficient cause for not being able to prefer the appeal before the date on which it was actually presented about 80 days after the period prescribed. But what he has

very seriously urged is that the fact that the application for condonation is now being filed about 6 years thereafter goes to demonstrate such negligence, inaction and want of care and caution as to disentitle the appellant to any extension of period. The learned counsel has in fact urged what was observed by the Supreme Court in *Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd.*, to the effect that "even after sufficient cause has been shown, the party is not entitled to condonation of delay in question as of right" but "discretion is given to the Court to condone the delay". And the learned counsel has argued that, assuming that there was sufficient cause for not preferring this appeal in time and filing it about 80 days thereafter, we must not exercise our discretion to condone the delay in view of the magnitude of negligence and inaction demonstrated by the State in applying for condonation after such a long lapse.

3. As pointed out in the Division Bench decisions of this Court in *Somnath Banerjee and Others Vs. Vivek Salvi and Others*, and in *State of West Bengal v. West Bengal Judicial Service Association*, 1990-2 Calcutta High Court Notes 162), as a result of later Supreme Court decisions in *Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others*, and in *G. Ramegowda, Major and Ors Vs. Special Land Acquisition Officer, Bangalore*, the apparent rigour of the observations in *Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd.*, to the effect that delay may not be condoned even on proof of sufficient cause therefore, or that each day's delay is to be explained, has stood abated, mollified and modified. But that apart, there are also clear observations in *Ramlal* itself (*supra*, at 365) to the effect that the explanation for the delay must relate only to the period from the expiry of the last date to the date of presentation of the appeal, and any inaction or negligence during any period anterior to the last date is irrelevant and immaterial. Therefore, if the appellant is under the obligation to explain only the period which is beyond the period prescribed up to the date of its actual presentation, his action or inaction during any other period, whether prior or subsequent, to the period of delay made in preferring the appeal, should be of no consequence and is not to be taken into consideration in considering the question of condonation of delay u/s 5 of the Limitation Act.

4. And that is what it should be. Suppose an appeal filed only one day or one week beyond the prescribed period was admitted in the usual course and the delay could only be detected by the court or the parties only at the time of hearing after, say, about 5 years (not very unusual these days). In that case, any Court would condone the delay of one day on proof of sufficient cause and the fact that the appellant has applied for condonation after such long lapse would be rather immaterial. We must not forget that u/s 3 of the Limitation Act, the Court has been mandated to dismiss a time-barred proceeding even suo motu and the Court thus failed in its duty by retaining the appeal for all these years. Before asking the appellant as to why he has not applied for condonation earlier, the Court may have to face the question as to why it has not dismissed the appeal so long. Section 3 of the Limitation Act mandates [the Court to dismiss an appeal, whether or not the respondent pleads limitation. That being so, once it is not

disputed that the appellant has explained the delay in presenting the appeal, the prayer for condonation is not to be rejected solely on the ground that the prayer has been made after long lapse of time.

5. It is true that Rule 3A of Order 41 of the Code of Civil Procedure, inserted by the Amendment of 1976, now provides that when an appeal is presented after the expiry of the period limitation specified therefore, it shall be accompanied by an application setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period. But a Division Bench of this Court has ruled in *Sm. Sipra Dey Vs. Ajit Kumar Dey*, that the provision is not that mandatory to warrant outright rejection of the memorandum of appeal unaccompanied by such application and the Court can condone delay even on an application filed later.

6. A Division Bench of this Court in *State of West Bengal and Others Vs. Hari Prasad Singh and Others*, has, however, held that "notwithstanding the provisions of Rule 53 of the Writ Rules, in view of the provisions of Section 141 of the Civil Procedure Code, the provisions of the said Code will not have any application to the writ cases under Article 226 of the Constitution". In that view of the matter, an application for condonation cannot be declined for not being filed along with the appeal in accordance with Rule 3A of Order 41 of the Code.

7. With respect, I have, however, my own doubts as to whether the Division Bench in *Hari Prasad Singh (supra)* is right in holding that the provisions of the CPC "will not have any application" to proceedings under Article 226 of the Constitution. It is true, as pointed out by the Division Bench, that Section 141 of the Code, which makes the provisions of the Code applicable *mutatis mutandis* "in all proceedings in any Court of Civil Jurisdiction" has now been amended in 1976 which has added an "Explanation" to that section providing *inter alia* that "the expression 'proceedings' ..... does not include any proceeding under Article 226 of the Constitution". The Code of Civil Procedure, therefore, cannot *ex proprio vigore* and on its own, apply to a proceeding under Article 226. But even then, I have not been able to understand as to how Section 141 of the Code, excluding, as it does, the proceedings under Article 226 from its purview, can stand in the way of a competent legislative authority from providing, by way of legislation by incorporation or legislation by reference, that the provisions of the Code shall nevertheless apply to such proceedings. Rules framed by this Court relating to Applications under Article 226 of the Constitution have been framed by this Court to come into force with effect from 23rd May, 1986, in exercise of the powers maintained and affirmed by Article 225 of the Constitution and have all the force of law and Rule 53 thereof clearly provides that "save and except as provided by these Rules and subject thereto, the procedure provided in the CPC in regard to suits shall be followed, as far as it can be made applicable, in all proceeding for issue of a writ".

8. Even if Section 141 did not, as it now does in view the explanation added thereto by the 1976 Amendment, expressly exclude, writ proceedings from its

purview, still then the Code could not apply to all writ proceedings for the obvious reasons that writ proceedings relating to criminal matters are not, as they cannot be, "proceedings in any Court of Civil Jurisdiction" within the meaning of Section 141. But accepting that the procedure laid down in the Code could not in any event apply on its own to writ matters in the Criminal Jurisdiction in view of the expression "proceedings in any Court of Civil Jurisdiction" in Section 141 and now, after the Amendment of 1976, cannot also directly apply to Civil Writ proceeding also, I have nevertheless utterly failed to understand why the Code would not apply in a later competent legislation adopts, incorporates or otherwise makes it applicable to proceedings to which it would not have applied *ex proprio vigore* because of Section 141 of the Code. Rule 53 of our Writ Rules, being a competent piece of legislation, having adopted the Code by way of what is known as legislation by reference and having made the provisions of the Code applicable to writ proceeding in 1986, I would require much stronger reasons than what are stated in Hari Prasad Singh (*supra*) to persuade me to agree that provisions of the Code would still not apply.

9. But accepting, as we ordinarily should, the decision of a co-ordinate Division Bench as far as possible and thus holding that the Code does not apply to writ proceeding, then any application as provided in Rule 3A of Order 41 Code is not necessary in an appeal from a writ proceeding. And in that case, if an application for extension of time u/s 5, Limitation Act, would in no way amount to an application under the Code of Civil Procedure, would it attract the provisions of Article 137 of the Limitation Act, 1963 providing for a period of three years as the period of limitation? The law on the point that held the filed, as would appear from the decisions of the Supreme Court in *Wazirchand Mahajan and Another Vs. Union of India (UOI)*, and in *Town Municipal, Council, Athani Vs. The Presiding Officer, Labour Courts, Hubli and Others etc.*, was that the settled view that the residuary Article 181 of the proceeding Limitation Act of 1908 did not apply to applications other than those required to be made under the Code of Civil Procedure, would also apply to the residuary Article 137 of the present Limitation Act of 1963 and, therefore, Article 137 must also be treated to be applicable only to applications under the Code of Civil Procedure. And an application for extension of time u/s 5 of the Limitation Act in respect of a writ appeal, could not be regarded to have any reference to the Code of Civil Procedure, if as held by the Division Bench of this Court in *Hari Prasad Singh (supra)*, the Code cannot apply to writ proceedings and a writ appeal is obviously not a creature of the Code.

10. But the correctness of this view in *Athani Municipality (supra)*, holding that Article 137 of the Limitation Act, 1963, like predecessor being Article 181 of the Limitation Act of 1908, would not apply to applications other than those connected with the Code of Civil Procedure, has been doubted in a later three Judge Bench decision of the Supreme Court in *Nityananda, M. Joshi and Others Vs. Life Insurance Corporation of India and Others*, and has finally been overturned in yet a later three Judge Bench decision in *The Kerala State*

Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, and it has been ruled that whatever might have been the position under Article 181 of the preceding Limitation Act of 1908, Article 137 of the present Act of 1963 would apply to all petitions and application filed in Court and is not confined to petitions or applications under the Code of Civil Procedure. The upshot, therefore, is that Article of the Limitation Act, 1963, in the absence of express provisions to the contrary, shall apply, not only to applications under the Code of Civil Procedure, but to applications under other enactments also. It would, therefore, apply to applications u/s 5 of the Limitation Act, provided that the section requires any application at all.

11. It is now settled beyond doubt that if in a given case, the Court finds that a party had sufficient cause for not filing an appeal or application within time, it can always condone the delay even on a verbal prayer and without any application. The Division Bench of the Allahabad High Court, speaking through Mt. Kulsoomun Nissa and Another Vs. Noor Mohammad alias Sultan Haider and Another, had even ruled that in such a case, non-condonation of delay on the ground of absence of any application would amount to illegal exercise of jurisdiction. A five-Judge Bench of this Court, speaking through Chief Justice Chakravartti, in Chairman, Budge Budge Municipality Vs. Mongru Mia and Others, has condoned the delay in preferring the appeal after long lapse of time on a verbal prayer.

12. As has been pointed out by Yogeswar Dayal, J. (then in Delhi High Court) in Nirmal Chaudhary Vs. Bishambar Lal, , and also by our learned brother Samir Kumar Mookerjee, J. in Bhanumati v. Jugak Kishore 1989 1 Calcutta High Court Notes 33, the provisions of Section 5 do not either expressly or even by implication, indicate that the powers of the Courts thereunder can be exercised only on an application or not at all. Applications are generally made and to quote from the Delhi decision, "if it is made, well and good; but if it is not made, and only an oral prayer is made, for the condonation of delay, the Court is not powerless if there is material on the record to show facts constituting sufficient cause for condonation of delay".

13. Mukherjee J. in Bhanumati (supra) has also ruled, relying on the five-Judge Bench decision in Chairman, Budge Budge Municipality (supra) and the Division Bench decision in Sipra Dey (supra), that the provisions of Section 5, Limitation Act do not require any application for their invocation or operation and "no explanation for delay in filing the same, therefore, is called for".

14. But even assuming that the CPC would apply to a writ appeal also, as it does to other appeals governed by the Code, Rule 3 A of Order 41, CPC far from prescribing or envisaging any period of limitation within which an application for condonation is to be filed, prescribed no period at all, but only directs that such an application is to accompany the Memorandum of Appeal. And as already noted, the Division Bench decision of this Court in Sipra Dey v. Ajit Kumar Dey (supra), has held the provisions relating to be Memo of Appeal to be

accompanied by an application for condonation are not mandatory and delay can also be condoned on an application filed later. There is thus no period of limitation for an application u/s 5, Limitation Act in any view of the matter.

15. And there should be none for very good reasons. As already noted, u/s 3, Limitation Act, the Court is under a mandatory obligation to dismiss a time-barred proceeding, even though limitation was not pleaded. Suppose, at the time of hearing of an appeal more than a decade after it was instituted, which is not very unusual these days, it is detected that the appeal was slightly beyond time, even though the appeal continued so long without any advertence to the question of limitation. Suppose further, that while detecting the same, the Court also found on the materials on record, or otherwise, that there was sufficient cause for extending the time and condoning the delay. Would it be just and proper to hold that even though there was good and sufficient reason to condone the short delay, the appeal, which may be otherwise meritorious, must nevertheless be dismissed and the delay cannot be condoned as the appellant, through inadvertence or otherwise, could not apply for condonation in time or within a reasonable period?

16. The reason which are weighing with me in condoning the delay are mainly two. Firstly, even the Counsel for the respondent could not dispute that there was good and sufficient cause for the delay of about 80 days in preferring the appeal. True, there has been extraordinary delay in filing the application for condonation. But all that a party can do is to engage a lawyer to file an appeal and to provide him with all that may be necessary to do so. The steps to be taken, if so necessary, to file an application for condonation must then be the sole responsibility of the lawyer and a party should not be penalised for the inaction, laches, negligence or carelessness of the lawyer. We must look to the litigant behind and beyond the lawyer, more so, when in our cumbrous adjudicatory process and the labyrinth of laws, with adjective and substantive, a litigant has got to surrender absolutely to his lawyer as a patient does to the surgeon. As pointed out by the Division Bench of this Court in *Somnath Banerjee and Others Vs. Vivek Salvi and Others*, the upshot of the decisions of the Supreme Court in *Rafiq and Another Vs. Munshilal and Another*, . *Goswami Krishna Murarilal* 1984-4 SCC 574 and in *Smt. Lachi Tewari and Others Vs. Director of Land Records and Others*, appears to be that, to quote from *Rafique Munshilal (supra)*, "the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned Advocate to do the rest of the things", "as after engaging a lawyer the party may remain supremely confident that the lawyer will look after his interest". The Supreme Court has proceeded to observe further in the form of a question, "what is the fault of the party who having done everything in his power and expected of him would suffer because of the default of Advocate" and after raising the question as to whether a party should suffer for the inaction, negligence or other fault of the Advocate, the Supreme Court has answered by declaring that "the answer is obviously in the negative".

17. The second reason is that the-appellant is the Government whose immobility is almost proverbial. Even though we go on chanting almost with devotional fervour the doctrine of Equality before law and proclaim our rigid adherence thereto, our Legislature has never hesitated to treat the Government differently and our Courts have also upheld such differential treatment on the ground that the Government can be reasonably classified to form a distinct and separate class to warrant such treatment. The much longer periods prescribed by our law of limitation for Governmental actions Clearly demonstrate the anxiety of our legislature to treat the Government differently from the ordinary private litigants. We are equally vocal in proclaiming that Government is not, and cannot be, a favoured litigant in a Court of law. But notwithstanding such assertions, our apex Court has conceded the necessity of a somewhat different approach while considering the question as to whether the Government has been able to make out a "sufficient cause" for extention of time and condonation of delay in its favour. Reference may be made to, among others, two rather recent decisions of the Supreme Court in *G. Ramegowda, Major and Ors Vs. Special Land Acquisition Officer, Bangalore*, and in *Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others*, and the reasons which have weighed with our apex Court in approving a somewhat more liberal and favourable approach towards the Government appear to be as hereunder :--

(1) If appeals or other proceedings initiated by the Government are lost, no person is individually affected but what in the ultimate analysis suffers is public interest,

(2) The decisions of the Government are collective and institutional decisions and do not share the characteristics of private individuals.

(3) Government decisions are proverbially slow, encumbered, as they are, by a considerable degree of procedural red tape in the process of their making. On account of impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with note-making, file-pushing and passing-on-the-buck ethos, delay on its part is less difficult to understand, though more difficult to approve.

(4) Implicit in the very nature of Governmental functioning is procedural delay incidental to the decision making process. It might therefore be somewhat unrealistic to exclude these factors which are peculiar to and characteristic of the functioning of the Government.

(5) While a private person can take instant decision, a "bureaucratic organ hesitates and debates, consults and considers, speaks through paper, moves horizontally and vertically will at last it gravitates towards a conclusion unmindful of time and personality".

(9) A certain amount of latitude is, therefore, not impermissible and it is rightly said that those who bear the responsibility of the Government must have "little

play at the joints". It would perhaps be unfair and unrealistic to put Government and private parties on the same footing in all respects in such matters.

18. I would accordingly condone the delay and admit the appeal. But as indicated at the out-set, the prayer for stay of operation of the order under appeal would be declined for if the appellant could stay so long and for about 6 years without taking any steps towards the admission of the appeal, I find no reason to grant stay.

Ajoy Nath Ray, J.

19. I respectfully agree with the conclusions reached by his Lordships Justice Bhattacharjee, though for reasons, again with respect, different from his Lordship's to some degree. Accordingly I agree that the appeal be admitted, the delay condoned, but stay be refused. At first I was minded to dismiss the application altogether, but after reading Justice Bhattacharjee's variously reasoned learned Judgment, I changed my mind.

20. This is an application on behalf of the appellant State authorities made about six years after the presentation of a? later memoandum of appeal, for condonation of delay of about eighty days.

21. While praying for condonation of delay, learned advocate for the state also prayed for stay of operation of the impugned Order, in case we were minded to admit the appeal. Keeping in view the fact that an application by way of contempt had already been made in the Court below for non-implementation of the impugned Order, we have considered the application for stay along with the application for condonation.

22. The judgment sought to be appealed from is of 14th November, 1984. There being no stay, the judgment was due to be put into effect, and thus, the application for contempt had also been filed against the State authorities.

23. On 4th March, 1985 (wrongly typed as August in the tenth paragraph of the present petition) the State authorities, through advocate, filed in the department the delayed memorandum of appeal, and then to use plain language, went to sleep for six years.

24. If the application for condonation had been made along with, or soon after, the presentation of the memo, I am quite sure that there was a good likelihood of the delay being condoned straightway. But that not having been done, and this instant applicant for condonation having been made only on 31st January, 1991, it is barred under the residuary Art. 137 of the Limitation Act, 1963, the period of three years having long expired.

25. But, like in other applications, it would be possible to condone this delay beyond three years even, for the provisions of condonation apply to applications under the residuary Article as well as to other applications.

26. An application for condonation of delay is also itself an application; no

specific period being prescribed for its limitation the residuary article will apply. Learned advocate for the State contended that no application is needed for condonation of delay. I do not think that is right. Unless an application is made how will the Court be put in motion? Surely it is not the job of the Court suo motu to seek out delays of litigants and go on condoning them. Again, if no application is needed for condonation, how is the present application of the State to be classed?

27. Quite clearly, the application for condonation need not necessarily be in writing, it may be orally made. Nor need it be very formal. But an application there must be. I do not see any contrary view in the authorities cited for the State (AIR 1965 SC 450 , at para 7; Smt. Sandhya Rani Sarkar Vs. Smt. Sudha Rani Debi and Others, ; Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, ; Meghraj Vs. Jesraj Kasturjee and Another, ; Chittoor Co-operative Town Bank Ltd. Vs. T. Krishnaiah Chetty and Another, ).

28. An oral application is equally subject to the laws of limitation as a written application. There is no law which says otherwise. If it were otherwise, one could attempt to get round limitation intentionally by making oral applications instead of written ones. But I quite see that if there is a slight delay in filing the memo of appeal originally, an oral prayer for condonation, made at the time of hearing of the appeal, (may be after many years), is not always realized to be an application orally made, which is barred by time under the residuary Article.

29. The prevailing practice of this Court on the appellate side is that a late memorandum is returned to the interested party or advocate (Appellate Side Rules, Ch. V, R. 13) not on its own motion by the department, but when inquiry is made at, or a visit is paid to the department, by the person interested. In the instant case the memorandum was returned and thus taken back on 7th February, 1991, that is, a week after the application for condonation was made.

30. The general applicability of the residuary Art. 137 has been clearly laid down in the The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, .

31. The State has not even sought to explain this delay of nearly three years beyond the initial residuary permitted period of three years. But in fairness, that is because neither side realized that Art. 137 was already standing in the way. However, a barred application should ordinarily be dismissed whether the point is specifically taken in opposition or not. As such this application is liable to be dismissed, but for the prayers for admission of appeal made on behalf of the State, which I beneficially construe as an informal oral prayer for condonation of the delay in presenting this application beyond three years.

32. I agree respectfully with Justice Bhattacharjee that the present law overwhelmingly favours condonation of delay in preferment of appeals, especially by the State. Under this circumstance, the mere admission of appeal without stay is not likely to cause much prejudice to the respondents. On the other hand, it may be that in the appeal, when it is heard, the State will have something

substantial to say.

33. It is needless to add that under general principles enshrined in O. 41, R. 5 of the Code, delay alone may be sufficient to disentitle the appellant from relief in the matter of obtaining a stay pending disposal of appeal. I find an unreasonable delay in this matter, which I have concerned, in view of the special attitude now taken towards State appeals, for the purposes of limitation only. The delay, in fact, however, remains gross and largely unexplained, thus disentitling the State obtaining any order of interim stay during the pendency of the appeal.

34. Order accordingly.