

(2005) 08 CAL CK 0007

In the Calcutta High Court

Case No : M.A.T. No. 3664 of 2004, C.A.N. No. 9840 of 2004 (section 5) and
C.A.N. No. 9839 of 2004

State of West Bengal and Others

APPELLANT

Vs

Shyamapada Naskar and Others

RESPONDENT

Date of Decision : 17-08-2005

Acts Referred:

Citation : (2006) 1 CALLT 128

Hon'ble Judges : V.S. Sirpurkar, C.J.; Joytosh Banerjee, J

Bench : Division Bench

Advocate : R.L. Moitra and Saikat Banerjee, for the Appellant; Sadananda Ganguly and Ekramul Bari, for the Respondent

Final Decision : Allowed

Judgement

1. This is in application for condonation of delay in filing the appeal. The delay is of 328 days. In support of the submission there is an affidavit of one Md. Sirajul Islam working in the Directorate of School Education, West Bengal in the post of Assistant Director. He claimed in that capacity that he knows all the facts which had been stated in the application.

2. In order to appreciate the contention and counter contention, some dates will have to be seen. The order impugned in this case was passed on 18th November, 2003 whereby certain directions were issued to the District Inspector of Schools to approve the services of the petitioner to the post of Assistant Teacher in History in the school within four weeks from the date of receipt of all papers from the authorities of the said school. It was, therefore, obvious that the School was directed to send its records to the District Inspector of Schools and it was only on that the District Inspector of Schools was to act. It seems that the State had obtained the plain copy of the order and after reading the said order the State authorities were under the impression that unless the school authorities send all the relevant papers to the office of the District Inspector of Schools nothing could be done. On 16th January, 2004 the school authorities sent all the papers and

documents to the office of the District Inspector of Schools in terms of the orders of the Court and after receiving those papers the District inspector of Schools conceived the idea of filing the appeal and for that he requested the Legal Remembrancer, West Bengal to obtain the certified copy of the order, this was obviously in February, 2004. Thereafter, the District Inspector of Schools at the same time sent a proposal for preferring an appeal against the order to the Legal Remembrancer. It seems that thereafter the proposal of filing the appeal was processed by the Directorate and after getting formal approval from the State authorities the proposal reached the office of the Legal Remembrancer. That is the practice as pleaded by the State in this affidavit. In the present case even before the matter was processed by the Directorate, the District Inspector of Schools had already requested the Legal Remembrancer to apply for the certified copy for the simple reason that he had decided to recommend filing of appeal against the order. This application for issuance of certified copy ultimately came to be made on 16th March, 2004 and the certified copy was not made available even till the date when the appeal was actually filed on 11th October, 2004. Be that as it may, probably realising that the appeal was getting hopelessly late, a leave was obtained from the Court to file the appeal without the certified copy by the advocates who were engaged for that purpose. According to the affidavit the advocates were engaged by the order dated 25th March, 2004 and one Mr. Abhijit Banerjee of "A" panel was engaged by the State with one junior of his choice. It is on 7th April, 2004 that the junior was also engaged, he being Mr. Saikat Banerjee. The advocates demanded the certified copy as without that certified copy ordinarily they could not have filed the appeal. The matter was then stuck up as the certified copy was not made available and ultimately it seems that several attempts were made to obtain certified copy. In paragraph 11 of the application for condonation of delay it is asserted that petitioner No. 3, District Inspector of Schools, had to return empty handed every time he came to the High Court for the certified copy. On this backdrop that the said advocates engaged advised to file the memorandum of appeal without the certified copy, that leave was obtained and ultimately the appeal was filed on 11th October, 2004. It is then pleaded in the application that the delay was caused on account of official acts which is a normal routine with the filing of appeals by the State.

3. Mr. Rabilal Moitra, learned counsel appearing for the State very painstakingly brought all these facts to our notice. He has also relied on a decision of the Supreme Court by three Judges' Bench in the case of State of Haryana Vs. Chandra Mani and others, . He has very heavily relied upon paragraph 10 of that judgment wherein, according to the learned counsel, the delay at the instance of the State Government and the compulsion of the government have been appreciated by the Supreme Court in details.

4. As against this Mr. Ganguly, learned counsel appearing on behalf of the respondents, original writ petitioners, has very forcefully submitted that this was case where the State Government has shown very casual attitude in filing the appeal. Learned counsel is at pains to point out that here was a case where it

was not as if the order was not known to the State Government as admittedly the State Government had obtained the plain copy of the order. Learned counsel submitted that if it was decided that the appeal was to be filed and if the District Inspector of Schools had proposed filing of the appeal way back in the month of February or March 2004 as the case may be, there was no reason for the State to unnecessarily waste time up to the second week of October, 2004 when the appeal was actually filed. Learned counsel points out that the State has not discharged its burden to explain the towering delay of 328 days. Learned counsel also pointed out that if ultimately the State has chosen to file the appeal by obtaining leave of the Court to file the appeal without the certified copy, the same procedure could have been done even earlier and there is absolutely no explanation as to why this was not done earlier.

5. On these rival contentions it is to be seen as to whether the delay is justified and has it been satisfactorily explained.

6. Mr. Ganguly relied on three Supreme Court judgments they being P.K. Ramchandran v. State of Kerala, reported in AIR 1988 SC 2275; Hindustan Petroleum Corpn. Ltd. Vs. Yashwant Gajanan Joshi and others, ; and an unreported judgment in the case of State of West Bengal v. Md. Jainal Abedin (CC No. 888 of 2005 decided on 7th February, 2005). We will take into account first the law on the subject which has been dealt with in details in these judgments. There can be no doubt that in the decision relied upon by the State, there is a specific approach shown by the Supreme Court while considering the delay at the instance of the State. Whereas on this backdrop when we see the judgments relied upon by the Learned counsel for the respondents, the Supreme Court has in these cases considered the delay not from this particular angle. The Apex Court undoubtedly referred to the delay by the parties.

7. In the first case the delay was not condoned because it was of 565 days by the State of Kerala. There the High Court while condoning the delay had not recorded its "satisfaction". The Supreme Court observed that "the High Court does not appear to have examined the reply filed by the appellant as reference to the same is conspicuous by its absence from the order". In paragraph 3 the Supreme Court says it would be noticed from a perusal of the impugned order (supra) that the Court has not recorded any satisfaction that the explanation for the delay was either reasonable or satisfactory". Even on the merits the Supreme Court found that the reason given for the delay was almost non-existing. The reason in that case for delay was that there were too many matters pending in advocate general's office and the office was "fed up" with so many arbitration matters which were equally important as the case in question, The Supreme Court found that such could not attitude nor could such be a proper explanation for the claim. It was on this general principle the Supreme Court set aside the order passed by the High Court condoning the delay.

8. In the second case the delay was in filing the SLP by the Hindustan Petroleum Corporation Limited. The Supreme Court was not satisfied with the explanation

and that is why the Supreme Court mentioned in paragraph 1 of the judgment itself at the end that the Supreme Court was not satisfied with the grounds mentioned in the application. Therefore, that was a case where the Supreme Court dismissed the application for condonation of delay on merits.

9. The last decision relied on by the Learned counsel for the respondent is the unreported decision in which the order passed by the Supreme Court is quoted below:

The SLP is dismissed on the ground of delay leaving the question of law open.

10. In our opinion, this is not a question decided by the Supreme Court, all that the Supreme Court has done is left the question of law open meaning thereby, the controversy could be raised afresh. There are no guidelines provided in this order of the Supreme Court, there could be no ratio decidendi in the aforementioned orders of the Supreme Court.

11. In sharp contradiction is the judgment of the Supreme Court in the case of State of Haryana v. Chandra Mani (supra) which is by Hon'ble three Judges' Bench. In the aforementioned judgment the Supreme Court has pointed out as to how the delay occurred in the appeals or applications filed by the state to be considered. It has taken into account the peculiarity of the circumstances that the State is bound by its own rules and procedures that is to be complied with before filing an appeal. It has also taken note of the fact that the decision to file an appeal is an impersonal decision and of not a particular individual. It is further explained that the Court should examine matter on the merits. In this case, the case was hopelessly without merits. There a very significant observation is made that while deciding the question of delay the Courts could also go into the merits and consider the same. We do not propose to go into the merits of this case at this stage, for the simple reason that we are quite satisfied with the explanation offered, by the State. In our opinion, though the delay is towering, the explanation is quite satisfactory which is to the effect that once the matter is entrusted to the advocates, who are specially engaged for this case, there would be nothing left in the hands of the officials to push up the filing of the appeal. Lawyers after waiting for the certified copy have chosen to advise the State to file the appeal without the certified copy. It is a common knowledge that normally appeal is not filed without the certified copy though a leave could be taken from the Court to file the appeal without the certified copy. Learned counsel for the State very frankly and in our opinion very fairly submitted that there was no Damocles' sword of contempt hanging on the head of the State and it was perhaps because of that the State did not choose to file appeal without the certified copy. Be that as it may, we are quite satisfied from the explanation that the delay occurred not on account of any casualness and we are satisfied that every possible care was taken to prosecute the appeal in time. In that view we would choose to allow the application for condonation of delay.

12. As far as the application for stay is concerned. Mr. Ganguly wants, three

weeks" time to File his affidavit in opposition to the stay application. Time is granted for three weeks to file the affidavit in opposition.

Xerox certified copy of this order may be supplied to the parities, if applied for.