

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN
&
THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

Tuesday, the 17th day of October 2023 / 25th Aswina, 1945
CM.APPL.NO.1/2023 IN COML.A NO. 3 OF 2023

CS 96/2020 OF PRINCIPAL SUB COURT/COMMERCIAL COURT, KOLLAM

PETITIONER/APPELLANT:

MUHAMMEDSHAFEEK, AGED 48 YEARS,

RESPONDENTS/RESPONDENTS:

1. M/S. TASTY NUT INDUSTRIES, KILIKOLLOOR, KOLLAM, A PARTNERSHIP FIRM REPRESENTED BY ITS MANAGING PARTNER, S. MUHAMMEDNOUFAL, AGED 47 YEARS,
2. S. MUHAMMEDNOUFAL, AGED 47 YEARS, S/O. A. ABDUL SALAM, MANAGING PARTNER, M/S. TASTY NUT INDUSTRIES
3. A MUHAMMED FAIZAL, AGED 39 YEARS, PARTNER, M/S. TASTY NUT INDUSTRIES, KILIKOLLOOR, KOLLAM,
4. A. ABDUL SALAM, AGED 80 YEARS, S/O. ABDULLA KUNJU, PARTNER, M/S. TASTY NUT INDUSTRIES,

Application praying that in the circumstances stated in the affidavit filed therewith the High Court be pleased to condone the delay of 25 days in filing this appeal.

This Application coming on for orders upon perusing the application and the affidavit filed in support thereof, and upon hearing the arguments of M/S.A.PARVATHI MENON, P.SANJAY, BIJU MEENATTOOR, INDIRA.K.P., PAUL VARGHESE (PALLATH), P.A.MOHAMMED ASLAM, KIRAN NARAYANAN, RAHUL RAJ P., AMRUTHA M. NAIR, MUHAMMED BILAL.V.A, Advocates for the petitioner and of SRI.S.SREEKUMAR, Senior Advocate along with SRI.P.MARTIN JOSE, P.PRIJITH, THOMAS P.KURUVILLA, AJAY BEN JOSE, R.GITESH, MANJUNATH MENON, REJU PRASAD, SACHIN JACOB AMBAT, ANNA LINDA EDEN, HARIKRISHNAN S., Advocates for the respondents, the court passed the following:

ANIL K. NARENDRAN & SOPHY THOMAS, JJ.

C.M Appln.No.1 of 2023 in Coml.Appeal No.3 of 2023

Dated this the 17th day of October, 2023

O R D E R

Sophy Thomas, J.

This is an application under Section 5 of the Limitation Act, filed by the appellant to condone the delay of 25 days in filing the appeal.

2. The appellant was the defendant in Commercial Suit No.96 of 2020 on the file of Commercial Judge's Court, Kollam, and the respondents were the plaintiffs. They filed the suit for recovery of money, based on a contract entered into between them, for supply of raw cashew nuts. The Commercial Judge's Court, Kollam decreed that suit with costs on 04.03.2023, whereby the respondents/plaintiffs were entitled to realise Rs.19,75,448/- from the appellant/defendant, with 6% interest per annum from the date of suit till realisation.

3. The appellant applied for certified copy of the judgment on 04.03.2023, stamp papers were called on 20.05.2023 and stamps were produced on the same day, and copy also was delivered on 20.05.2023. So the appeal ought to have been filed on or before 20.07.2023. Since he had to adjust money from his business in order to raise the huge court fee, there occurred delay of 25 days in filing the appeal. There was no wilful negligence or default from his part and so, he filed this petition to condone the delay of 25 days.

4. Though no counter affidavit was filed, learned counsel for the respondents/plaintiffs opposed that petition contending that, the Commercial Courts Act, 2015 (hereinafter referred as 'the Act') was enacted for expeditious disposal of commercial disputes, and hence the Limitation Act has no application in commercial courts. Relying on Section 14 of the Act, he contended that, the Commercial Appellate Court and the Commercial Appellate Division shall endeavour to dispose of appeals filed before it within a period of six months from the date of filing of such appeal. Moreover, he would contend that the appellant has not explained the reason for the delay in a satisfactory manner, and his inability to raise the court fee amount, is not a valid ground to condone the delay. Hence, according to him, the application is liable to be dismissed.

5. After hearing the appellant and the respondents in part, learned counsel for the appellant filed an additional affidavit along with I.A No.2 of 2023, to accept additional documents as Annexures A1 to A4. That I.A was heard and allowed. In the additional affidavit, the appellant contended that, he lost his cashew business, and at the same time, he had several personal setbacks including an angioplasty for himself, prolonged ailment and hospitalisation of his father, and intermittent hospitalisation of his infant child in KIMS hospital, Trivandrum due to chronic respiratory issues. Annexure A1 is the discharge summary of his

nine month old child in KIMS Hospital, Trivandrum in July 2023. Apart from his inability to raise money to pay the court fee, he could not personally reach out to his counsel, for making the payment and to finalise the appeal. He was very vigilant in defending his case before the Commercial Court, and two times he had to approach this Court by filing OP(C) No.572 of 2021 and OP(C) No.1463 of 2021. Annexure A2 is the copy of the judgment in OP(C) No.1463 of 2021 and by that judgment, this Court directed the Commercial Court to dispose the suit within a period of four months from the date of receipt of certified copy of the judgment. The respondents/plaintiffs again approached this Court to enlarge the time, and the time was enlarged till 23.12.2022, and Annexure A3 is the certified copy of that order. When further enlargement of time was sought by the respondents/plaintiffs by filing I.A No.2 of 2022, the appellant/defendant opposed the same and it was dismissed on 23.12.2022, as per Annexure A4 order. According to the appellant, the Annexures will prove his bonafides and it will show that he was diligently defending the litigation throughout. Moreover the respondents will not suffer any injury, due to the short delay caused in filing the appeal.

6. After accepting the additional affidavit and documents, we heard learned counsel for the appellant/applicant and learned counsel for the respondents.

7. Admittedly, there is delay of 25 days in filing the Commercial Appeal. The reason for delay stated by the appellant in C.M Appln. No.1 of 2023 is that, he had to arrange huge amount as court fee for filing the appeal and hence occurred the delay. According to the appellant, one connected appeal also was there as Commercial Appeal No.2 of 2023, in which he had to pay court fee of Rs.11,68,072.03/-, apart from the court fee in the present appeal.

8. Learned counsel for the respondents, relying on the decision of the Apex Court in **Ajay Dabra v. Pyare Ram** in **[AIR 2023 SC 698 : 2023 SCC Online SC 92]**, argued that, the reason given by the appellant that he did not have sufficient funds to pay court fee, is not sufficient enough to explain the delay so as to condone the same. The Apex Court observed that, an appeal has to be filed within the stipulated period, prescribed under the law. Belated appeals can only be condoned, when sufficient reason is shown before the court for the delay. The appellant who seeks condonation of delay therefore must explain the delay of each day. The court went on to observe that, the courts should not be pedantic in their approach while condoning the delay, and explanation of each day's delay should not be taken literally, but the fact remains that there must be a reasonable explanation for the delay.

9. In **Ajay Dabra [AIR 2023 SC 698]**, the Apex Court was

considering delay of 254 days in filing an appeal in a suit for specific performance. The fact that the appellant, who was an affluent businessman and a hotelier, was not having sufficient funds to pay court fee was not found to be a satisfactory explanation, to condone the delay. The Apex Court observed that, even if the appellant was unable to pay court fee at the time of filing the appeal, even a defective appeal can be filed, which is deficient as far as the court fee is concerned, provided the court fee is paid within the time granted by the court.

10. When learned counsel for the respondents could impress upon this Court, with his argument that, inability to raise funds to pay court fee is not a sufficient ground to condone the delay, placing reliance on the decision of the Apex Court in **Ajay Dabra [AIR 2023 SC 698]**, the appellant filed an additional affidavit along with I.A No.2 of 2023 stating that, the reason for delay was not just that he was not able to raise sufficient money for the court fee, but he could not personally reach out to his counsel for the purpose of litigation. He produced Annexure AI discharge summary of his nine month old child, who was admitted in KIMS Health, Thiruvananthapuram on 25.07.2023. In that certificate, it was mentioned that, ten days back, the child presented history of fever for five days, associated with occasional cough and was referred from peripheral hospital with left lobe Pneumonia, in view of persistent respiratory distress. The child was admitted and treated in KIMS Health.

The discharge date seems to be on 30.07.2023, as seen from that certificate. The last date for filing the appeal was on 20.07.2023. Going by Annexure A1 discharge summary, his child was suffering from Pneumonia and was undergoing treatment in a peripheral hospital and from there the child was referred to KIMS hospital, and was admitted there on 25.07.2023.

11. Learned counsel for the respondents has not raised any serious disputes regarding the genuineness of Annexure A1 document. Now the case of the appellant is that hospitalisation of his nine month old baby due to Pneumonia during the relevant period, coupled with financial stringency, prevented him from personally reaching out to his counsel for the purpose of finalisation of appeal by making the payment for litigation expenses including court fee. That reasoning seems to be justifiable, especially in the light of Annexure A2 to A4 documents, which will show that he was diligently defending his case before the trial court.

12. Learned counsel for the respondents vehemently argued that Limitation Act has no application in commercial disputes, as the very object of such an enactment was to resolve all disputes of commercial nature expeditiously. If at all the Limitation Act, 1963 applies, each day's delay has to be viewed seriously, and it cannot be condoned as a matter of course, without valid and sufficient reasons.

13. Learned counsel for the respondents relied on the decision

Government of Maharashtra (Water Resources Department) represented by Executive Engineer v. Borse Brothers Engineers and Contractors Private Limited reported in [(2021) 6 SCC 460] to say that, the delay cannot be condoned in a casual manner, and even if sufficient cause has been made out in the facts of a given case, the appellant has no right to have the delay condoned. He relied on paragraph 62 of that judgment, which reads as follows:

"62. Also, it must be remembered that merely because sufficient cause has been made out in the facts of a given case, there is no right in the appellant to have delay condoned. This was felicitously put in *Ramlal v. Rewa Coalfields Ltd.* (1962) 2 SCR 762 : AIR 1962 SC 361 as follows :

"12. It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration; but the scope of the enquiry while exercising the discretionary power after sufficient

cause is shown would naturally be limited only to such facts as the Court may regard as relevant. It cannot justify an enquiry as to why the party was sitting idle during all the time available to it. In this connection we may point out that considerations of bona fides or due diligence are always material and relevant when the Court is dealing with applications made under Section 14 of the Limitation Act. In dealing with such applications the Court is called upon to consider the effect of the combined provisions of Sections 5 and 14. Therefore, in our opinion, considerations which have been expressly made material and relevant by the provisions of Section 14 cannot to the same extent and in the same manner be invoked in dealing with applications which fall to be decided only under Section 5 without reference to Section 14.”

14. As already stated initially, learned counsel for the respondents had challenged the application of the Limitation Act in a commercial court. Paragraph 63 of the decision cited *supra* will answer that query, in the following lines:

“63. Given the aforesaid and the object of speedy disposal sought to be achieved both under the Arbitration Act and the Commercial Courts Act, for appeals filed under Section 37 of the Arbitration Act that are governed by Articles 116 and 117 of the Limitation Act or Section 13(1-A) of the Commercial Courts Act, a delay beyond 90 days, 30 days or 60 days, respectively, is to be condoned by way of exception and not by way of rule. In a fit case in which a party has otherwise acted bona fide and not in a negligent manner, a short delay beyond

such period can, in the discretion of the court, be condoned, always bearing in mind that the other side of the picture is that the opposite party may have acquired both in equity and justice, what may now be lost by the first party's inaction, negligence or laches”.

15. In the decision cited supra, the delay in question was 131 days beyond the 60 days period provided for filing an appeal under Section 13(1A) of the Act.

16. In the decision in **Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy** reported in [(2013) 12 SCC 649], the Apex Court laid down the principles and guidelines in considering an application filed under Section 5 of the Limitation Act for condoning delay, detailing the obligation of courts in dealing with such an application. Paragraphs 21 and 22 of that decision read thus:

“21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1. (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms “sufficient cause” should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.3. (iii) Substantial justice being paramount and pivotal

the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6. (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7. (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9. (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts

should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11. (xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

21.12. (xii) The entire gamut of facts are to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13. (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

22. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:

22.1. (a) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

22.2. (b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

22.3. (c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

22.4. (d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity

can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters”.

17. We are conscious of the purpose and object of the enactment to have speedy disposal of commercial disputes. Section 13(1A) of the Act stipulates that, *'any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that high court within a period of sixty days from the date of the judgment or order'*.

18. In the case on hand, the delay occurred is 25 days. As held by the Apex Court in **Esha Bhattacharjee [(2013) 12 SCC 649]**, an application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system. True that, the reason stated in the first affidavit filed by the appellant along with C.M.Appln. No.1 of 2023, was not satisfactory. The additional affidavit coupled with Annexure A1 discharge summary of a nine month old baby of the appellant during the relevant period, reasonably justifies the delay. That document is not seriously disputed by the respondents. Moreover, in normal human parlance, one may not tell a lie that his nine month old baby was seriously ill, in order to save the period of limitation. The respondents have no case that they had lost anything acquired in

equity and justice due to the inaction or laches from the part of the appellant. Moreover, Annexures A2 to A4 documents are sufficient to show that the appellant was actively defending the litigation before the trial court. So, we take it as a fit case to exercise judicial discretion of this Court to condone the delay of 25 days in filing the appeal. But this being a commercial dispute, and there occurred a delay of 25 days in filing the appeal, beyond the prescribed period of limitation, we are inclined to allow this petition on cost of Rs.10,000/- to the respondents.

In the result, the C.M.Appln. No.1 of 2023 is allowed on cost of Rs.10,000/- (Rupees Ten thousand only). The appellant has to pay that amount to the respondents through their counsel, and file memo to that effect before this Court on or before 30.10.2023. On production of memo evidencing payment of cost, Registry to post the matter for admission before the Bench.

C.M.Appln No.1 of 2023 is allowed accordingly.

Sd/-

ANIL K. NARENDRAN, JUDGE

Sd/-

SOPHY THOMAS, JUDGE