

F.R.
A.

IN THE HIGH COURT OF SIKKIM AT GANGTOK

Civil Miscellaneous Application No. 19 of 2007
(Arising out of Writ Petition (C) No. 4 of 2003)

Kunzig Shamar Rimpoche,
Son of Thinley N. Athuptsang
At present residing at Bajuratna Kothi,
11 Miles, Kalimpong-734 301.

...Petitioner

-Versus-

1. Union of India,
Service through the Secretary,
Department of Home Affairs,
New Delhi.
2. State of Sikkim,
Service through the Chief Secretary,
Having his Office at Tashiling
Secretariat, Gangtok-737101, Sikkim.
3. The Chief Secretary,
Tashiling Secretariat,
Gangtok-737 101, Sikkim.
4. The District Magistrate,
East Sikkim,
Gangtok-737 101, Sikkim.
5. The Director General of Police,
Government of Sikkim,
Police Headquarters, Gangtok.
6. The Officer-in-Charge
Ranipool Police Station,
Ranipool, Sikkim.
7. Goshir Gyaltsab Rimpoche
Father's name not known,
Resident of Rumtek Monastery.

...Respondents.

A.

For the petitioner: Mr. Ashok Dey, Sr. Advocate with Mr. Ashit Kumar Bhattacharjee and Ms. Karma Yangchen, Advocates

For the respondents: Mr. J.B. Pradhan, Additional Advocate General, Sikkim with Mr. S.K. Chettri, Assistant Government Advocate for the official Respondents No. 2 to 6

Mr. Karma Thinlay, Central Government Counsel for Respondent No. 1

Mr. Anmole Prasad, Senior Advocate with Mr. N. Rai and Ms. Jyoti Kharka, Advocates for Respondent No. 7.

Date of Hearing : 10.09.2009

Date of Judgment : 10.09.2009

**PRESENT: HON'BLE THE CHIEF JUSTICE
MR. JUSTICE AFTAB H. SAIKIA
HON'BLE MR. JUSTICE A.P. SUBBA, JUDGE**

JUDGMENT AND ORDER (ORAL)

Saikia, CJ

Heard Mr. Asoke Dey, learned Senior Counsel assisted by Mr. Ashit Kumar Bhattacharjee and Ms. Karma Yangchen, learned Counsel for the petitioner as well as Mr. J.B. Pradhan, learned Additional Advocate General, Sikkim (for short, 'AAG') with Mr. S.K. Chettri, learned State Counsel on behalf of the State/official respondents.

MS

2. Also heard Mr. Karma Thinlay, learned Central Government Counsel (for short, 'CGC') appearing for respondent No. 1 and Mr. Anmole Prasad, learned Senior Counsel assisted by Mr. N. Rai and Ms. Jyoti Kharka, learned Counsel representing respondent No. 7.

3. This is an application under Section 5 of the Limitation Act, 1963 (for short, 'the Act') seeking condonation of delay of 828 days in preferring the restoration application being Civil Miscellaneous Application No. 18 of 2007, wherein it has been prayed to recall the order dated 01.11.2004 by which the main writ petition being WP (C) No. 04 of 2003, was dismissed for default and to restore the said writ petition to its original file and number.

4. Explaining the delay for acceptance as "sufficient cause" under Section 5 of the Act, the petitioner has made in this Miscellaneous Application the following averments and contents:

"1. Being aggrieved by and dissatisfied with the order of externment and restraint issued by the Government of Sikkim, the Respondent No. 2 herein, the Petitioner preferred a writ petition in this Hon'ble Court which came to be registered as Writ Petition (Civil) No. 4 of 2003 (Kunzig Shamar Rimpoche Versus Union of India & Others) for the reliefs mentioned therein.

2. In view of the aforesaid restraining order, the Petitioner was and is still not in a position to enter into the State of Sikkim and as such he had to depend on his learned Advocate-on-Record Mr. S.S. Hamal who was reposed with the duties of taking all necessary steps for and on behalf of the Petitioner in connection with the aforesaid writ petition.



3. The Petitioner used to get in touch with the said learned Advocate either over telephone or through letters.

4. So far the knowledge of the Petitioner, the said learned Advocate rendered his services properly since inception and till 29th July, 2004.

5. The Petitioner states that surprisingly the said learned Advocate kept an absolute silence after the said 29th July 2004 consequently the Petitioner had issued two letters dated 22nd September 2004 and 25th October 2004 to the said learned Advocate to know interalia the position of the case but neither the Petitioner was informed over telephone nor he was favoured with any reply of the said letters by the said learned Advocate.

6. The Petitioner is a monk and does not stay at any particular place for a long time and as such upon coming back to Kalimpong, one of the followers of the Petitioner namely Mr. Passang who lives in Rumtek, Dharma Chakra Centre, East Sikkim informed him that his writ petition has already been dismissed for default on the 1st November 2004.

7. On the 8th November 2006 an application for obtaining certified copy of the entire order sheet was filed and the same was delivered on 11th November 2006.

8. It appears from the aforesaid order sheet that by an order dated 1st November 2004, this Hon'ble Court was pleased to dismiss the writ petition as none appeared on the said date of hearing for and on behalf of the Petitioner.

9. In view of the aforesaid circumstances, the Petitioner issued another letter dated 15th November 2006 to the said learned Advocate asking him interalia the reason for non-appearance on the 1st November 2004 and whether he has taken any steps to protect his right and interest.

10. As usual the aforesaid letter has not been replied by the said learned Advocate nor he has sent any information whatsoever to the Petitioner.



11. Under this situation, the Petitioner over telephone had contacted Mr. Asok De, Senior Advocate and Mr. Samar Roychoudhury, Advocate and Mr. Asit Kumar Bhattacharya, Advocate, all practising in the High Court at Calcutta and were brought to Gangtok to move the writ petition at the initial stage. All the said Advocates were asked by the Petitioner whether they had any knowledge about the date of hearing of the case fixed on 1st November 2004 or whether they were informed by the said learned Advocate about the same or not.

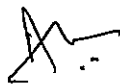
12. Upon knowing the result of the case as stated above, the aforesaid Mr. Roychoudhury, Advocate advised the Petitioner and accordingly he promptly came down to Calcutta and on the 15th February 2007 a conference was held at the chamber of the said Mr. De, Senior Advocate at 44B Jatin Das Road, Kolkata 700 029 when Mr. De advised the Petitioner to take out an application for restoration of the case.

13. In view of the aforesaid advice, the Petitioner instructed the said team of Advocates to do everything needful as a result an application for restoration has been prepared which has been affirmed by the Petitioner on the 5th March 2007 before the learned Notary Public at Calcutta.

14. In this connection, the Petitioner begs to state that after getting information on the 6th November 2006 about the dismissal of the writ petition on the 1st November 2004, the Petitioner firstly awaited information from his learned Advocate and when no information was received in spite of lapse of considerable time, he started to think to get in touch with the aforesaid team of Advocates from Calcutta and by this time winter holidays of this Hon'ble Court commenced on the 10th January 2007 and the same continued upto 26th February 2007.

15. The Petitioner submits that had the Petitioner been informed about the dismissal of the case immediately after 1st November 2004, then the instant application for restoration could have been filed within the prescribed period of limitation.

16. The Petitioner submits that the reasons and/or causes for delay in filing the instant application for



restoration are sufficient and bonafide and there remains no latches in filing the same.

17. The Petitioner submits that after getting information of dismissal of the writ petition (dismissed on 1st November 2004) on the 6th November 2006, he did not waste any time to prefer the instant application for restoration as would be evident from the aforesaid facts and circumstances. It is further submitted that the reasons for delay in preferring the application for restoration were beyond the control of the Petitioner.

18. Be that as it may, delay of 828 days in preferring the instant application for restoration may kindly be condoned otherwise the Petitioner will suffer irreparable loss and injury.”

5. Supporting the contentions and averments so placed on record in this Miscellaneous Application, Mr. Dey, the learned Senior counsel, has eloquently argued that the explanations narrated in the above paragraphs, more particularly paragraphs 11, 12, 13, 14, 15, 16 and 17 may be approved as “sufficient cause” for the purpose of condonation of delay in question.

6. The learned senior counsel has evocatively contended that while entertaining the petition for condonation of delay, the Court should always view the matter with a pragmatic approach and such power of condonation exercising under Section 5 of the Act, being discretionary, has to be liberally construed. According to him, the petitioner, who is a monk, has, in order to preach the spiritual teaching, to visit frequently various parts of the country as well as abroad and accordingly he does not stay at any particular place for a long time. Under such situation, it is urged, he could not be

personally present before the Court for which he had to fully rely upon his engaged counsel who was fully authorised to represent him in the Court as and when necessary and to conduct the case on his behalf. In the case at hand, the petitioner was never informed by his engaged lawyer who was entrusted for such purpose, about the dismissal of his writ petition for default.

7. It is urged by the learned senior counsel that the impugned order of dismissal for default on 01.11.2004 was not even duly intimated to the petitioner for which he was not fully aware of the dismissal of the matter and he came to know about such dismissal order only on 06.11.2006.

8. Drawing our careful attention to the paragraph 17, as quoted above, Mr. Dey, the learned senior counsel, has vehemently submitted that from 06.11.2006 till the date of filing of this Miscellaneous Application on 15.03.2007, the delay has been properly and satisfactorily explained. Besides, according to the learned senior counsel, in the interest of justice, this Court has the power to advance substantial justice, by condoning the delay in question so as to give relief to the petitioner. According to him, if the matter is heard on merit there is every possibility of getting a result in affirmative in the main writ petition wherein the order of externment and restraint issued by the Government of Sikkim has been put under challenge. It is, therefore, contended that if the instant condonation petition is not considered liberally, the



petitioner would be highly prejudiced and shall suffer irreparable loss and injury which cannot be compensated in any other terms.

9. To substantiate such arguments, Mr. Dey, the learned senior counsel has relied on catena of judicial authorities so pronounced by the Apex Court. Those are as follows:

- (i) **AIR 1987 SC 1353 (*Collector, Land Acquisition, Anantnag and another vs. Mst. Katiji and others*)**
- (ii) **(1999) 4 SCC 450 (*Hindustan Petroleum Corporation Ltd. Vs. Dolly Das*)**
- (iii) **(2000) 9 SCC 733 (*Radha Krishna Rai vs. Allahabad Bank and others*)**
- (iv) **(2001) 6 SCC 176 (*M.K. Prasad vs. P. Arumugam*)**
- (v) **(2004) 1 SCC 119 (*Apangshu Mohan Lodh and others vs. State of Tripura and others*)**


10. The ratio laid in all the above cited cases has the clear indication that the expression "sufficient cause", while granting relief to the party in a condonation matter, always to be considered liberally. The Supreme Court held in those cases particularly in *Collector, Land Acquisition's case* (supra) that in a case of condonation of delay, the Court has to make a justifiably liberal approach and the doctrine "every day's delay must be explained" must be applied in a rational common sense pragmatic manner. It

is established that the discretionary power under the Act has to be considered judicially and reasonably by the Court.

11. It has also been observed by the Apex Court that the expression "sufficient cause" in Section 5 of the Act must receive a liberal construction so as to advance substantial justice and generally delays be condoned in the interest of justice where gross negligence or deliberate inaction or lack of bona fides is not imputable to the party seeking condonation of delay (see *M.K. Prasad's case* (supra) at para 9 p. 179).

12. Resisting this application for condonation of delay, Mr. Pradhan, the learned AAG, has submitted that the contentions and averments made in the instant Application itself would manifestly go to show that the delay in question has not been properly explained and those grounds taken in support of condonation of delay in question cannot be termed as "sufficient cause".

13. In the same breath, Mr. Prasad, learned senior counsel appearing for respondent No. 7, has also argued that the condonation petition itself lacks sufficient materials to show bona fide on the part of the petitioner in causing such delay in preferring the restoration petition. Relying on the contentions and averments made in the objection/affidavit filed by the respondent No. 7 against this Miscellaneous Application, he has submitted that the delay in question cannot be condoned on the basis of explanation



set out in this petition itself and keeping in view the facts and circumstances narrated in the application for condonation itself, this application is liable to be dismissed.

14. Mr. Thinlay, learned CGC, has also contended, relying on the affidavit filed on behalf of the Union of India, that this application merits dismissal as the same has failed to satisfy the Court with cogent reasons for the condonation of delay so sought by the petitioner.

15. We have given our thoughtful consideration to the submissions and arguments so put forwarded and advanced by the learned counsel for the parties. We have also meticulously perused the averments and contentions so made in the condonation petition as quoted above, in the form of explanation on delay in question including the counter-affidavits filed on behalf of all the respondents.

16. It appears, as per paragraph 5 of this instant application, the petitioner's counsel engaged to look after his case before this Court had not intimated the correct position of the case on those relevant time. Despite the petitioner's efforts to contact him, neither the petitioner was informed nor he was favoured with any reply by his learned counsel rather the said counsel kept an absolute silence. However, as per paragraph 6, the petitioner was informed by one Passang who was a resident of Rumtek Dharma Chakra Centre



that his petition was dismissed for default on 01.11.2004. Be it noted that this paragraph 6 does not indicate the date and year when the petitioner was informed by that person.

17. The contention made in paragraph 7 disclose that on 08.11.2006 an application for obtaining certified copy of the entire order sheet was filed and the certified copy was delivered on 11.11.2006. Hence, according to this paragraph, the petitioner received the certified copy on 11.11.2006 which is directly in contradiction and conflict with the statements made in paragraph 14 wherein it was categorically stated that he got the information on 06.11.2006 about the dismissal of the writ petition on 01.11.2004.

18. It transpires that save and except, paragraphs 14 and 17, no attempts have been in any other paragraphs in the petition as quoted above, to make an acceptable explanation as regards the delay in question.

19. Paragraph 14 of this petition indicates that when the petitioner got the information on 06.11.2006, which itself belies the statement made in paragraph 7, he firstly awaited information from his learned counsel and when no information was received in spite of lapse of considerable time, he started to think to get in touch with the panel of advocates from Kolkata that has been mentioned in paragraph 11 and by that time winter holidays of the Hon'ble



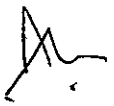
High Court commenced from 10.01.2007 till 26.02.2007. Significantly there has been no mention anywhere in any explanation recorded in the condonation petition about what steps have been taken by the petitioner to file the application for condonation of delay from the date of his knowledge i.e. 06.11.2006 till 10.01.2007 the date when winter vacation of this Court started as well as in between 27.02.2007, the date of reopening of the High Court and 15.03.2007, the date when this present application has been filed.

20. Now coming to paragraph 17 which is claimed to be the core paragraph, as asserted by Mr. Dey, the learned senior counsel, wherein the cause of delay has been sufficiently and satisfactorily explained in order to bring the same within the purview of expression "sufficient cause", we have found that only explanation that has been set out thereof is that after getting information about the dismissal of the writ petition on 06.11.2006, the petitioner "did not waste any time to prefer the instant application for restoration as would be evident from the aforesaid facts and circumstances" whereas admittedly the petitioner has filed the instant petition after a gap of about one year and four months. It is further submitted in that paragraph that "the reasons for delay in preferring the application for restoration were beyond the control of the petitioner." This statement would itself candidly project that the petitioner has not taken the matter seriously and appears not to be



vigilant. His entire approach towards such delay in question, is, as it transpires, careless and casual. It is felt that the petitioner has taken a cavalier attitude towards the filing of such application for seeking condonation because after 06.11.2006 till the filing of this application on 15.03.2007, there is no whisper as regards what steps he has taken to approach this Court as expeditiously as possible so that condonation of delay matter can be entertained and considered. Explaining the delay in question, the petitioner has basically stated that he did not waste any time to prefer the instant application although it is apparent on the face of the record that he took 128 days in between 06.11.2006 and 15.03.2007 i.e. about 4 months including 48 days of winter vacation which starts from 10.01.2007 to 26.02.2007 in filing the related restoration petition.

21. It is true that while interpreting the "sufficient cause" the Court should make pragmatic approach and the same has to be liberally construed in the interest of justice. But in the instant case, it is experienced otherwise. In the case at hand, a bare perusal of the averments made in this application, as quoted above, would explicitly campaign that all along from the date of dismissal of the main petition for default till the filing of this petition for condonation of delay, the petitioner has taken a lukewarm approach and his conduct cannot be said to be that bona fide so as



to give him reliefs by attracting the provision of Section 5 of the Act so as to condone the delay in question.

22. There is no disagreement to accept that the Law of Limitation has been enacted to serve the interest of justice and not to defeat it. Nonetheless, acceptability of explanation for the delay is always the sole criterion and length of delay matters irrelevant. Unless there is intentional delay adopted as a dilatory tactic or the element of mala fide, normally the Court should condone the delay. At the same time, it should be borne in mind that equity cannot be the basis for extending the period of limitation because the Court exercising its discretion has no power to extend period of limitation on equitable grounds unless Court accepts the explanation as sufficient.

23. In *P.K. Ramachandran vs. State of Kerala and another* reported in (1997) 7 SCC 556, the Supreme Court in paragraph 6, has strongly ruled that the law of limitation may harshly affect the party seeking condonation but it has to be applied with all its rigour when the statute so prescribes and the Courts have no power to extend the period of limitation on equitable grounds. Paragraph 6 speaks as under:

“6. Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the Courts have no power to extend the period of limitation on equitable grounds. The discretion exercised by the High Court was, thus, neither proper nor judicious. The order condoning the



delay cannot be sustained. This appeal, therefore, succeeds and the impugned order is set aside. Consequently, the application for condonation of delay filed in the High Court would stand rejected and the miscellaneous first appeal shall stand dismissed as barred by time. No costs."

24. In our humble opinion, the case at hand is a fit case where the proposition of law laid down in *Ramachandran's case* (supra.) gets its applicability so as to refuse to give relief so sought in this application.

25. Having regard to the judicial precedents cited by the learned senior counsel appearing for the petitioner and also keeping in view the facts and circumstances of the case in its totality as emerged from the statements and contentions as quoted above and placed on record by way of explanation for seeking condonation of delay as well as upon hearing the learned counsel for the parties, we are of the considered view that this application is bereft of merit.

26. Accordingly the Miscellaneous Application stands dismissed.

27. However, there shall be no order as to costs.


Judge.


Chief Justice.

rsr/jks