

Vip Builders and Developers and Another Vs. Amol C. Naik and Others

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Court : Maharashtra State Consumer Disputes Redressal Commission SCDRC
Mumbai

Decided On : Dec-20-2012

Judge : S.B. Mhase President & the Honourable Mr. Narendra Kawde
Member

Appeal No. : First Appeal No. A/12 of 760 alongwith MA/12 of 232 (Delay) (Arisen out of Order Dated 31/07/2009 in Case No. 117 of 2008 of District Additional DCF, Thane) First Appeal No. A/12 of 770 alongwith MA/12 of 239 (Delay) (Arisen out of Order Dated 31/07/2009 in Case No. 118 of 2008 of District Additional DCF, Thane) First Appeal No. A/12 of 771 alongwith MA/12 of 240 (Delay) (Arisen out of Order Dated 31/07/2009 in Case No. 122 of 2008 of District Additional DCF, Thane) First Appeal No. A/12 o

Appellant : Vip Builders and Developers and Another

Respondent : Amol C. Naik and Others

Judgement :

S.B. Mhase, President:

Heard Adv. S. B. Prabhavalkar on behalf of the Applicants/Appellants and Adv. Digamber Thakre on behalf of the Non-Applciant/Respondent in MA/12/232 in A/12/760 and Adv. Smt. Panchashila Narawade on behalf of the Non-Applciant/Respondents in MA/12/239 in A/12/770 to MA/12/242 in A/12/773.

[2] This is an application seeking condonation of delay in filing an appeal. Surprisingly, in the prayer clause of the delay condonation application though there is a prayer for condonation of delay, the period of which the delay is being sought to be condoned is not stated. In prayer clause of the delay condonation application reference is made to paragraph (08) of the said application. Paragraph (08) of the said application points out that there is a delay of two years and ten months in filing the appeal. Delay is calculated from the date of order. It is further stated that if the delay is to be calculated from the date of knowledge, there is a delay of approximately sixty days and if, the delay is calculated from the date of issuance of certified copy of the impugned order then there is no delay in filing the appeal. Such type of delay condonation is not expected in law. This is an argumentative process which is placed in paragraph (08) of the delay condonation application. When a prayer is being made, the period must be certain in respect of delay to be condoned and the sufficient reasons for condonation of delay must be stated in the application. For the simple proposition there may be several arguments possible. However, that does not mean that the arguments are the facts and those are required to be considered to condone the delay because period must be certain while making a prayer in an application for condonation of delay. Without much commenting upon it we propose to proceed in this order.

[3] Consumer Complaint bearing Nos.117 of 2008, 118 of 2008, 119 of 2008, 122 of 2008 and 139 of 2008 were respectively filed by five Complainants. In all these consumer complaints, the Opponents were the same, namely the Opponent No.1 M/s. VIP Builders and Developers, Having address at - Joshi-Kunj, M. V. Road, Andheri (East), Mumbai - 400069 and the Opponent No.2 Mr. Pankaj Bhupatlal Bhayani, Resident of - Joshi-Kunj, M. V. Road, Andheri (East), Mumbai - 400069. All these Complainants are the flat-purchasers and the Opponents in these complaints referred to above are the Builders and Developers. Since the complaints were as against the present Applicants/Appellants all those complaints appear to have been heard together by the Additional District Forum, Thane and a common order by one judgment was passed by the Additional District Forum, Thane on 31/7/2009. Appeals as against this order have been filed on 13/6/2012 and, therefore, respective delay condonation applications have been filed. In these delay condonation applications notices were issued to the Non-

Applicants/Respondents and the Non-Applicants/Respondents have filed their respective replies opposing the application for condonation of delay.

[4] Grounds put-forth for condoning the delay are stated in paragraphs (04) and (05) of the delay condonation application. In paragraph (04) it is stated that though the Complainant is in possession of the flat, it is an illegal possession and for that purpose, the Applicant/Appellant (the Opponent in the complaint) had moved an application before the District Forum for appointment of a Court Commissioner and the District Forum at one stage decided to consider this application alongwith the hearing of the complaint and fixed the complaint for its final hearing on 31/7/2009. It is further averred that it may not be out of place to mention that no directions were given to the party to file the affidavit in lieu of evidence and/or written notes of arguments which is a mandatory requirement under the Consumer Protection Regulations, 2005. On 31/7/2009 submissions were made by respective counsels and the order was reserved. It appears that the order was passed on the same day i.e. 31/7/2009 and vide clause (07) of the operative part of the said order the District Forum had directed the Registrar to forward copy of the impugned order to the parties to the said complaint. In paragraph (06) of the application for condonation of delay it is stated that on 13/3/2012 the Applicant/Appellant was shocked and surprised to receive the non-bailable warrant issued by the District Forum in Execution Application No.41 of 2012 and on perusal of the said document it was revealed to the Applicant/Appellant that the order has been passed on 31/7/2009. However, the same was not served upon the Applicant/Appellant at any point of time till he received the non-bailable warrant of arrest from the District Forum. Further, the Applicant/Appellant states that these facts were disclosed to his advocate and the advocate advised the Applicant/Appellant to file an appeal and thereafter the Applicant/Appellant applied for a certified copy of the order dated 31/7/2009 which he received on 4/6/2012 and thereafter present appeal has been filed.

[5] In short, the ground for delay condonation is that while the application for appointment of a Court Commissioner was pending and the complaint was to be heard on 31/7/2009, it was decided after hearing the parties and the Applicant/Appellant came to know about the impugned order when he received

non-bailable warrant of arrest on 13/3/2012.

[6] Non-Applicant/Respondent has placed on the record Roznama of the complaint from 14/8/2008 onwards till final disposal of the complaint. From these Roznama we find that prior to 18/6/2009 a summons was issued at the request of the Applicant/Appellant (who is the Opponent in the complaint) to one Mr. Rahul Panaskar. Said witness, namely - Mr. Rahul Panaskar appears to have remained present before the District Forum on 18/6/2009 and his statement was recorded and thereafter, the complaint was fixed for final hearing and thus was adjourned to 16/7/2009. The Complainants and the Opponent were present before the District Forum on 16/7/2009. The Opponent filed an application. That application was rejected by the District Forum and the arguments of both the parties were heard and thereafter the complaint was reserved for order on 31/7/2009. All these facts show that after completion of evidence in the complaint, the complaint was fixed for arguments on 16/7/2009 and on the date of arguments when an application was preferred by the Opponent, said application was rejected by the District Forum and the arguments of both the parties were heard and the complaint was reserved for order on 31/7/2009. It is further seen from the Roznama dated 31/7/2009 that as per the scheduled date a common order was passed by the District Forum in respect of above-referred complaints. Therefore, from the Roznama what we find is that the parties were aware of the fact that the date 31/7/2009 is fixed for order and accordingly, an order has been passed by the District Forum. We have recorded this in order to point out that the statements and averments made by the Applicant/Appellant in the application for condonation of delay which have been reproduced here-in-above stand falsified and incorrect to the record of District Forum. One more aspect which is very interesting to be noted from paragraph (04) of the delay condonation application is that it is stated therein by the Applicant/Appellant that on 31/7/2009 the submissions were made by the respective counsels and the order was reserved. It appears that the order was passed on the same day i.e. 31/7/2009. Vide clause (07) of the operative part of the said order the District Forum had directed the Registrar to forward copy of the impugned order to the parties to the complaint. These statements in the application for condonation of delay are contrary to the Roznama because on 31/7/2009 the complaint was fixed for pronouncement of order and, therefore, the

statement that on the said date respective counsels were heard is an incorrect statement. However, assuming for the sake of argument that on 31/7/2009 the counsels were heard and on the same day the judgment and order was passed then, there was no question of reserving the complaint for order and the order must have been pronounced in presence of the parties. Therefore, the statement that on the said date the order was reserved is an incorrect statement. It appears to us that in usual manner the District Forum observed that the order shall be communicated to the parties. However, that does not mean that the order was not passed on that date. Further, we would like to record the fact that it is nobodys case before the State Commission that on 31/7/2009 the order was not passed by the District Forum. Thus, the fact remains that the District Forum had passed an order on 31/7/2009 and that was the scheduled date given to the parties for declaration of an order. Therefore, we find no fault on the part of the District Forum so far as declaration of the order dated 31/7/2009 is concerned. On the contrary, we record our finding that the statements made by the Applicant/Appellant in paragraph (05) of the delay condonation application are contrary to the record of the District Forum.

[7] There is one more aspect. It is a contention of the Applicant/Appellant that he received information of the order when he received non-bailable warrant issued by the District Forum in Execution Application No.41 of 2012 on 13/3/2012. Thereafter, the application for certified copy, therefore, should have been immediately made. However, it was not so made. On the contrary, the Applicant/Appellant participated in the execution proceeding and on 8/5/2012 the District Forum passed an order in Execution Petition No.41 of 2012, punishing the present Applicant/Appellant under Section-27 of the Consumer Protection Act, 1986. In paragraph (07) of the delay condonation application, the Applicant/Appellant states that thereafter i.e. after 8/5/2012, he consulted present advocate (means the advocate who is conducting the appeal) who advised him to file an appeal. It is further stated that present advocate further advised him to apply for a certified copy of the order and, therefore, an application was made for certified copy of the order and thereafter the Applicant/Appellant received certified copy of the order on 4/6/2012 and thereafter appeal has been filed on 13/6/2012. That shows that immediately after 13/3/2012 an application for certified copy was

not immediately made but it was made sometime after 8/5/2012. We have to mention all these facts because certified copy of the order does not mention the date on which the application for certified copy was made though the date on which certified copy was issued is mentioned viz. 4/6/2012. However, fact remains upon reading the statements made by the Applicant/Appellant in the application for condonation of delay that from 13/3/2012 to 8/5/2012 no steps were taken by the Applicant/Appellant to file an application for certified copy of the impugned order and thereafter also the application appears not to have been made till 4/6/2012. Since we have called the Registrar, Additional District Forum, Thane who is accompanied by a clerk of the District Forum, who reports to us that application was made on 4/6/2012 and a certified copy was immediately issued on 4/6/2012 itself. That shows even after receipt of non-bailable warrant, the Applicant/Appellant was not diligent in making an application for certified copy of the impugned order. Not only that but from the statements of the Applicant/Appellant in the application for condonation of delay it is evident that he decided to file such application only after 8/5/2012 when his present advocate advised him to file an appeal. Earlier to that there was no idea in the mind of the Applicant/Appellant to file an appeal against the impugned order dated 31/7/2009. This we have scanned on the basis of statements made in the delay condonation application. There is one more aspect that an appeal as against the order dated 8/5/2012 passed in Execution Petition No.41 of 2012 has been filed before the State Commission on 8/6/2012. However, alongwith the said appeal present appeal was not filed. Present appeal has been filed on 13/6/2012. If at all the Applicant/Appellant received the certified copy of the impugned order dated 31/7/2009 on 4/6/2012, an appeal against said order could have been filed on or before 8/6/2012. However, it was not filed and there is no explanation on the record in this respect.

[8] One more fact requires to be mentioned which has been brought to the notice of State Commission by the Non-Applicant/Respondent. Non-Applicant/Respondent pointed out that a Writ Petition No.6771 of 2009 was filed before the Honble Bombay High Court by the Applicant/Appellant (original Opponent) in the month of July-2009. In the said writ petition apart from the prayers in respect of certain applications to be taken on the record, a prayer was

made that the complaint may be transferred to some other District Forum. In paragraph (12-j) of this writ petition, it is stated as follows:-

That the next date of hearing of the said Complaint is 30.07.2009 on which date the Honble Forum proposes to pass the final order on the Complaint without disposing the interlocutory applications of the Petitioner.

[9] Thus, it is revealed that the Applicant/Appellant was aware that 31/7/2009 was the date fixed by the District Forum for pronouncement on an order. Apart from that said writ petition appeared before the Honble Bombay High Court on 10/8/2009. It appears that the President and the Members of the District Forum were called by the High Court alongwith the file and when it was noticed that the order has been passed on 31/7/2009 the High Court disposed of the writ petition after having observed that the appropriate remedy of appeal is available to the parties and thus, the writ petition was rejected. What is important to be noted is that on 10/8/2009 the Applicant/Appellant came to know that the District Forum has passed an order because that date of order is referred by the High Court in its order dated 10/8/2009 and, therefore, immediately after passing of this order dated 10/8/2009 by the Honble Bombay High Court, it was obligatory on the part of the Applicant/Appellant to make an application to the District Forum for providing him a certified copy of the order dated 31/7/2009 which he has not made. What is important in the backdrop of these circumstances the statement made in paragraph (06) of the delay condonation application that on 13/3/2012 when the Applicant/Appellant received non-bailable warrant issued by the District Forum in Execution Application No.41 of 2012 he had knowledge of the order passed by the District Forum on 31/7/2009 is absolutely a false statement. All types of cock and bull stories are tried to be developed for the purpose of delay condonation which are devoid of record of the District Forum and the order passed by the Honble Bombay High Court.

[10] Apart from that we have called the record from the District Forum and also copy of the same has been annexed by the Non-Applicant/Respondent. It appears that after passing an order on 31/7/2009 as per the directions given by the District Forum in clause No.(07) of the operative part of the order, a copy of the said order

was dispatched to the Applicant/Appellant on 20/8/2009. An entry to that effect has been produced on the record. It shows that the order passed in the above-referred five consumer complaints had been dispatched. Learned Counsel for the Applicant/Appellant tried to submit that since five copies had been sent in one postal packet, the postal stamp affixed to it Rs.20/- X 02 is insufficient and, therefore, said packet must not have been delivered to the Applicant/Appellant. Firstly, we would like to state that in the application for condonation of delay and so also in the affidavit filed by the Applicant/Appellant in support of contentions raised in the application for condonation of delay, there is no statement made by the Applicant/Appellant that free copy was not supplied to him and/or free copy sent to him was not received and, therefore, presumption in respect of postal dispatch stands. No doubt, it is a rebuttable presumption under the Indian Evidence Act, 1872 though it is not applicable to the proceeding before Consumer Fora under the Consumer Protection Act, 1986 but such statement is not there. Further, when there is a common judgment and order passed by the District Forum, therefore, it is not necessary to send five copies. One judgment is the judgment in all consumer complaints and, therefore, one copy must have been sent and accordingly, postal stamp of Rs.20/- X 02 has been affixed by the office of the District Forum. We need not go into this controversy because there is no such case made out by the Applicant/Appellant and he has remained conspicuously silent about this aspect in the application for condonation of delay and in his affidavit and, therefore, presumption of postal dispatch stands as against the Applicant/Appellant. Apart from that what we find the address of the Applicant/Appellant as reflected from the consumer complaint and also from the appeal memo is one and the same and there is no dispute over his address. Therefore, only legal inference that follows is that the Applicant/Appellant received free certified copy of the impugned order which was dispatched by the District Forum on 20/8/2009. However, the Applicant/Appellant did not immediately prefer an appeal. Applicant/Appellant was advised to file an appeal only after punishment was inflicted against him under Section-27 of the Consumer Protection Act, 1986 by the District Forum in Execution Petition No.41 of 2012 vide an order dated 8/5/2012. Therefore, initially when the complaint was decided the Applicant/Appellant by deciding not to prefer an appeal, has acquiesced the order.

However, when the punishment was imposed on him for non-compliance of the order, it was advised to the Applicant/Appellant that a better way to come out of it is to prefer an appeal as against the order dated 31/7/2009 and, therefore, an afterthought decision has been taken with an object to protract the execution of the order by filing this appeal with an application for condonation of delay.

[11] Regulations 18, 20 and 21 of the Consumer Protection Regulations, 2005 contemplate the Registrar shall forward the certified copies of the order to the parties free of charge and if thereafter further copies are demanded, those copies shall be charged. Free copy of the impugned order was accordingly sent on 20/8/2009. Therefore, we find that there is statutory compliance on the part of the Registrar of the District Forum and the benefit of the same cannot be taken by the Applicant/Appellant. It further appears that after the order was passed by this Commission calling for the record from the District Forum as regards dispatch of free copy etc., the Registrar of the District Forum had tried to get an appropriate report from the postal authorities by a letter dated 2/8/2012 and the postal authorities have informed that the record is time-barred and weeded out. That does not help the Applicant/Appellant in any way. Non-availability of the record of service etc. cannot lead to an inference that service was not effected especially in the backdrop of the circumstances that there is no challenge made by the Applicant/Appellant anywhere before us. On the contrary, what we find is that the Applicant/Appellant has acquiesced to the order and it is only after 8/5/2012 a decision was taken to prefer an appeal on the advice of the advocate. Therefore, in the given circumstances a way is being tried to be sought by filing an appeal alongwith delay condonation application. By filing this appeal there is a dishonest effort on the part of the Applicant/Appellant to protract the execution of the impugned order and especially the appeal in respect of punishment. There is no substance in the application for condonation of delay. Hence, we reject the application for condonation of delay. However, in each application for condonation of delay we impose costs of Rs.5,000/- on the Applicant/Appellant which shall be paid to the other side in addition to the amounts which are already directed to be paid by the District Forum.

Hence, we pass the following order:-

ORDER

Miscellaneous Application No. 232 of 2012 in Appeal No.760 of 2012, Miscellaneous Application Nos.239 of 2012 in Appeal No.770 of 2012, Miscellaneous Application Nos.240 of 2012 in Appeal No.771 of 2012, Miscellaneous Application Nos.241 of 2012 in Appeal No.772 of 2012 and Miscellaneous Application No.242 of 2012 in Appeal No.773 of 2012 stands rejected. Consequently, the appeals are not entertained.

Applicant/Appellant shall bear his own costs and in each application for condonation of delay the Applicant/Appellant shall pay costs of Rs.5,000/- to the other side in addition to the amounts which are already directed to be paid by the District Forum.

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