

State of Kerala Vs. Kunju

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Court : Kerala

Decided On : Aug-12-2005

Reported in : 2005(4)KLT611

Judge : J.B. Koshy and; K.R. Udayabhanu, JJ.

Acts : [Limitation Act, 1963](#) - Sections 5 and 30 - Schedule - Article 119; ;
[Arbitration Act, 1940](#) - Sections 2; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order
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Appeal No. : Arb. A. No. 15/2005 and C.R.P. No. 592/2005

Appellant : State of Kerala

Respondent : Kunju

Advocate for Def. : M.M. Abdul Aziz, Sr. Adv.,; Jyothish J. Kallingal and; M

Advocate for Pet/Ap. : K.L. Joseph, Government Pleader

Judgement :

J.B. Koshy, J.

1. Power of the court to condone the delay under Section 5 of the Limitation Act in public interest to avoid denial of substantial justice is one of the issues considered in this judgment. For deciding that issue, interpretation of the words 'sufficient

cause' appearing in Section 5 of the Limitation Act, on the facts of each case assumes importance. Common order dismissing I.A.No. 1879 of 1997 to set aside the award passed in O.P. (Arb.) No. 19 of 1996 and I.A.No. 453 of 2005 to condone the delay in filing the above application are challenged in these proceedings. An award passed by the sole arbitrator was forwarded to the Court by letter dated 8-2-1996 and on getting notice, appellant-State appeared on 30-5-1996. Time was allowed for filing objection. Within the time allowed for filing the objection, State filed I.A.No. 1879 of 1997 on 29-3-1997 for setting aside the award. There was delay of 315 days in filing the petition for setting aside the award. When objections were raised on the ground of delay, the Sub Court condoned the delay in filing the petition for setting aside the award by order dated 9-12-1999, even without a formal petition for condoning the delay. It is not disputed that even without a formal petition the Court has got power to condone delay if there are valid and sufficient grounds to condone the delay. Even if an objection is filed incorporating the grounds for setting aside the award, it can be treated as a petition to set aside the award as held by the Apex Court in *Madan Lal v. Sunderlal and Anr.*, : [1967]3SCR147 . However, such petition should also be filed within 30 days of notice of passing award in view of the provisions of the Limitation Act. Article 119 (b) of the [Limitation Act, 1963](#) prescribes a period of limitation of 30 days for an application under [Arbitration Act, 1940](#) for setting aside an award from the service of notice of filing the award. It is also well settled that the Court has the power to condone the delay in filing petition for sufficient reasons and Section 5 of the Limitation Act is applicable as held in *Government of A.P. v. Durgaram Prasad*, : AIR 1984 AP14 . The court suo motu condoned the delay in filing the appeal after hearing both sides. The Sub Court considered the matter and passed preliminary order wherein it was held as follows:

'...the arbitrator has not given notice to the parties and the parties came to know of the publishing of the award on the notice issued by the court. Thereafter the court ordered to file objection and in the course of extended time the present application to set aside the award was filed on 29-3-1997. In such cases it is unfair and illegal to hold that the application is filed out of time.'

The court also found as follows:

'... Notice hasn't been served on the respondent in compliance with the Act. Since the respondent filed the objection within the extended period, it follows that the court has already condoned the delay and accepted the objection. Therefore, the preliminary objection that the petition is barred by limitation is not entertainable.'

2. Revision application was filed against the above order as C.R.P.No. 31 of 2000. It was dismissed by this Court. Contractor filed review petition RP.No. 578 of 2001 and the Court remitted the matter for consideration whether sufficient grounds are there to condone the delay. The delay was 315 days. Again, the Sub Court condoned the delay. The Court observed as follows:

'23. The respondents' contention that actually time has been extended as evidenced from the proceedings and the B Diary and that the respondents believed in bona fides that there was extension of time accordingly cannot be ignored. It has earlier been observed as per the impugned order that since the respondent filed objection within the extended period it follows that Court has already condoned the delay and accepted the objection.'

The above order was challenged in Writ Petition. A learned single Judge of this Court again remanded the matter by judgment in W.P.(C) No. 35636 of 2004. While remanding the matter, the Court ordered as follows:

'The question of delay in filing the application for setting aside the award under Section 30 has not been considered properly. A formal application for condonation of delay may not always be necessary, but the reason for condoning the delay should be considered by the Court.'

3. After remand, a formal application, I.A.No. 453 of 2005, for condoning the delay was filed. It is true that at the time of filing formal application, there was delay of 8 years and 252 days. While dismissing the petition by the impugned order, the Court below observed as follows:

'...In these circumstances, I find that I.A.No. 453/2005 which was filed only on 21 - 1 -2005 do not deserve consideration at all. As rightly pointed out by Shri P.A. Davi the said petition was filed after a long period of 8 years and 256 days and

that too filed by the District Government Pleader quoting flimsy reasons.'

We are of the opinion that the question to be considered is not the delay in formal application after remand. On the basis of the remand order, question to be considered is whether 315 days' delay in filing the application is to be condoned or not. It was also found that no grounds are made out to condone the delay of 315 days. The court observed as follows:

'The provisions in the Limitation Act are intended for bringing an end to the litigation. There are no exceptional provisions which enables the Government of Kerala to escape from the provisions of Limitation Act. It is seen that no grounds are made out to condone the delay of 315 days in filing the objection. A vague averment that there is administrative delay between the office of Government Pleader and the office of Superintending Engineer is not sufficient to condone the delay. It is true that a large sum of public money is involved in the matter. But, that is not a ground to deny the claimant his legitimate claim.'

The delay in filing the petition is 315 days. It is the contention of the appellant that the delay occurred mainly due to administrative reasons and in the interest of substantial justice, delay ought to have been condoned, otherwise it will affect public revenue and interest of the public.

4. Before going into the merits of the delay condonation petition, we will go through the contentions of the appellant in the petition filed for setting aside the award to appreciate whether any substantial injustice has been caused. The estimated PAC of the work was Rs. 27,80,9387-. The contractor quoted 86.5% of the above and the agreed PAC was Rs. 44,06,080/-. Original period of contract expired on 14-5-1985. By letter dated 18-5-1984 the contractor agreed to carry out the work as per the revised design without extra claim. On 2-11-1984 the contractor undertook in writing that he will not claim extra payment. The contractor completed the work on 30-3-1988 and payment was made on the basis of agreed costs. Any enhancement granted is, therefore, against the terms of the contract and the arbitrator travelled beyond the terms of the contract and committed misconduct. There was no clause for arbitration in the agreement. The contractor filed O.P. (Arb.) No. 97 of 1987 for appointing an arbitrator. It was dismissed by the Sub

Court. Appeal filed before this Court was also dismissed holding that there was no arbitration clause and, therefore, arbitrator cannot be appointed. The above judgment was dated 29-9-1989. After six years, contractor filed a representation to the Minister for appointment of an arbitrator. By that time, time for filing civil suit also expired. Therefore, when claim was raised before the arbitrator, those claims were time barred. On 7-11-1995, by Government order an arbitrator was appointed. It is the contention of the appellant that by Government order, arbitrator cannot be appointed even though Government is a party to the contract. In any event, there is no written agreement for arbitration. Section 2(a) of the Arbitration Act provides for written agreement. Without a written agreement, whether signed by both or not, there cannot be any arbitration as held by the Apex Court *Jugal Kishore Rameshwardas v. Mrs. Goolbai Hormusji*, : [1955]2SCR857 and *Banarsi Das v. Cane Commissioner, Uttar Pradesh and Anr.*, : AIR 1963 SC1417 . But, acquiescence of the appellant and waiver of objection in appointing the arbitrator may go against the appellant in view of the finding of the Supreme Court in *State of Rajasthan v. Nav Bharat Construction Co.*, : AIR 2005 SC2795 . But, according to the learned Government Pleader, at that time Government machinery was collusively aiding the contractor in extracting public money. Even if there is waiver of objection for appointment of arbitrator, at the time of his appointment all the claims were extinguished and time barred as Government order appointing arbitrator was made after seven years of completion of contract and after six years of dismissal of petition for appointing of arbitrator. This court held that there is no arbitration clause and hence no arbitrable dispute. It is argued that there might be malpractice, corruption or favouritism in issuing the above Government order and the court should not be a party to such fraudulent transactions. Arbitrator passed award on 5-12-1996. According to the appellant, the arbitrator travelled beyond the terms of the contract and committed misconduct. Total award was for Rs. 41,14,180/- with 12% from 20-11-1995. Now, it is more than Rs. One Crore. To point out glaring mistakes, the Government Pleader drawn our attention to the award granted on account of water scarcity in the area. Rs. 9,90,000/- was awarded by the arbitrator for conveyance of water alone. After considering the availability of water etc, only the contractor quoted for the amount and, in any event, for a building like, huge amount of additional charges for conveyance of

water is exorbitant and shocking to the conscious. According to the Government Pleader, more than a crore of rupees including interest is ordered to be paid defeating the provisions of law as well as against the public interest to a private individual after all claims are extinguished by lapse of time.

5. It is vehemently contended by the Senior Counsel appeared for the respondent that absolutely no valid reasons are stated for condoning the delay. Mere administrative delay is not sufficient to condone the delay as held by the Apex Court (two-member Bench) in P.K. Ramachandran v. State of Kerda, : 1997ECR785(SC) . It is further submitted that the Government is like any other litigant before the Court and no special consideration can be given to the Government. Law of limitation has to be applied with all its rigour. It is well settled law that Section 5 of the Limitation Act is applicable while considering the question of limitation in filing application to set aside the arbitration award. Section 5 of the Limitation Act reads as follows:

5. Extension of prescribed period in certain cases.-- Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation:-- The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.'

In New India Insurance Co. Ltd. v. Smt. Shanti Mishra, : [1976]2SCR266 , the Apex Court held that 'discretion given by Section 5 of the Limitation Act is not defined or crystallized so as to convert a discretionary matter into a rigid rule of law. The expression 'sufficient cause' should receive a 'liberal' construction.' In O.P. Kathpalia v. Lakhmir Singh, : AIR 1984 SC1744 , the Supreme Court held that if the refusal to condone the delay results in grave miscarriage of justice, the same would be a ground to condone the delay. In Collector, Land Acquisition Anantnag, and Ors. v. Mst. Katiji and Ors., : (1987)ILLJ500SC , the Supreme Court held as follows:

'The Legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression 'sufficient cause' employed by the Legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realised that:

(1) Ordinarily a litigant does not stand to benefit by lodging an appeal late.

(2) Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

(3) 'Every day's delay must be explained' does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

(4) When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

(5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

(6) It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.'

6. Denial of justice on technical grounds has to be avoided as far as possible. That will not mean that law of limitation has to be ignored in appropriate cases. The court has discretion to condone the delay if circumstances warrant. As contended by the counsel for the respondent, Government cannot say that it has got a special status in the matter of condonation of delay. All parties are equal. At the same time, court cannot take a step-motherly attitude to the Government. In *N. Balakrishnan v. M. Krishnamurthy*, : 2008(228)ELT162(SC) , the Supreme Court condoned the delay of 883 days merely on the ground that advocate failed to inform the party in time on payment of cost of Rs. 10,000/-. Hon'ble Apex Court took the view that when the delay is not deliberate, mala fide or as a delaying tactics, court should not shut the door for litigants and the words 'sufficient cause' should receive 'a liberal construction so as to advance substantial justice'. The very same approach has to be taken when the litigant is State. The whole question is whether there are sufficient reasons to condone the delay especially when question of substantial justice is involved. The grounds raised cannot be stated to be mere frivolous grounds. Substantial grounds are taken up by the Government. Whether that is acceptable or not is a different question. Amount involved is also very huge. With regard to Government litigations, it was held by the Apex Court in *State of Haryana v. Chandra Mani and Ors.*, : 2002(143)ELT249(SC) as follows:

'It is notorious and common knowledge that delay in more than 60 per cent of the cases filed in this Court - be it by private party or the State - are barred by limitation and this Court generally adopts liberal approach in condonation of delay finding somewhat sufficient cause to decide the appeal on merits. It is equally common knowledge that litigants including the State are accorded the same treatment and the law is administered in an even handed manner. When the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the buck ethos, delay on the part of the State is less difficulty to understand though more difficulty to approve, but the State represents collective cause of the community. It is axiomatic that decisions are taken by officer/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay - Intentional or otherwise is a routine.

Considerable delay of procedural red tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression 'sufficient cause' should, therefore, be considered with pragmatism in justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay.'

7. The Government should not suffer merely because of some act of the officers especially when that act is not above board or against public interest. In *Special Tahsildar, Land Acquisition, Kerala v. K.V. Ayisumma*, : AIR 1996 SC2750 , it was observed as follows:

'2. It is now settled law that when the delay was occasioned at the behest of the Government, it would be very difficult to explain the day-to-day delay. The transaction of the business of the Government was being done leisurely by officers who had no or evince no personal interest at different levels. No one takes personal responsibility in processing the matters expeditiously. As a fact at several stages, they take their own time to reach a decision. Even in spite of pointing at the delay, they do not take expeditious action for ultimate decision in filing the appeal. This case is one of such instances. It is true that Section 5 of the Limitation Act envisages explanation of the delay to the satisfaction of the court and in matters of Limitation Act made no distinction between the State and the citizen. Nonetheless adoption of strict standard of proof leads to grave miscarriage of public justice. It would result in public mischief by skilful management of delay in the process of filing the appeal. The approach of the Court should be pragmatic but not pedantic.'

In *G. Ramegowda, Major and Ors. v. Special Land Acquisition Officer, Bangalore*, : [1988]3SCR198 , the Apex Court held that when delay occurred due to unusual conduct or negative or evasive attitude of officers or Government Pleaders, Court can condone delay on facts and circumstances of the case. In that case, there was delay of more than one year. Court found that no sufficient cause was shown for condoning the delay. But, the Court observed as follows:

'16. The law of limitation is, no doubt, the same for a private citizen as for governmental authorities. Government, like any other litigant must take responsibility for the acts or omissions of its officers. But a somewhat different complexion is imparted to the matter where government makes out a case where public interest was shown to have suffered owing to acts of fraud or bad faith on the part of its officers or agents and where the officers were clearly at cross-purposes with it.' Finally, the Court held as follows:

'18.... Government could and ought to have moved with greater diligence and dispatch consistent with the urgency of the situation. The conduct of government was perilously close to such inaction as might, perhaps, have justified rejection of its prayer for condonation. But as is implicit in the reasoning of the High Court, the unarticulated thought, perhaps was that in the interest of keeping the stream of justice pure and clean the awards under appeal should not be permitted to assume finality without an examination of their merits.'

After in depth analysis of all the previous case law, Apex Court in State of Nagaland v. Lipok Ao and Ors., : 2005(183)ELT337(SC) held as follows:

' 15. It is axiomatic that decisions are taken by officers/agencies proverbially at a slow pace and encumbered process of pushing the files from table to table and keeping it on the table for considerable time causing delay -- intentional or otherwise -- is a routine. Considerable delay of procedural red tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression 'sufficient cause' should, therefore, be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a vis private litigant could be laid to prove strict standards of sufficient

cause.'

8. In this case, after long lapse of time of the completion of contract and after six years of the judgment of the court that there is no arbitration clause in the agreement, contractor managed to get a Government order appointing an arbitrator. Even though huge amount was granted, Government officers including the Government Pleader, skilfully managed not to file an application to set aside the award in time. Even when Government Pleader took notice from the Court in the Arbitration O.P. filed to pass decree in terms of the award, after several adjournments for filing objection, he filed application to set aside the award after the period of limitation without a petition for condoning the delay. Skilful management of delay or unusual conduct of Government Pleader is clear when the matter was remanded a petition to condone the delay was filed without a proper affidavit. He did not ask any officer for explaining the delay, but, filed an affidavit though he was not the Government Pleader when the delay occurred. As observed by the Apex Court in Ramegowda 's case (supra), Government officers appear to have acted at cross-purposes. But, only one relieving factor is that petition to set aside the award was filed within the extended time granted for filing objections. On the facts of this case, we are of the opinion that in the interest of justice and in public interest, delay should be condoned. State should not be penalised for the lapse of some of the officers or Government Pleaders. Impugned orders are set aside. I.A.No. 483 of 2005 is allowed. Court below is directed to dispose of O.P.(Arb.) No. 19 of 1996 and I.A.No. 1879 of 1997 as expeditiously as possible untrammelled by any of the observations in this judgment on merits of the matter. Parties shall appear before the court below on 17-10-2005. Registry is directed to send back the lower court records with a copy of this judgment urgently.