

IN THE HIGH COURT OF DELHI AT NEW DELHI

MAC.APP. 158/2007

Date of Decision: 21st May, 2009

THE NEW INDIA ASSURANCE CO LTD Appellant

Through : Mr. D.K. Sharma, Adv.

versus

CO. SURINDER PAL & ANR Respondents

Through : Mr. V.P. Chaudhary, Sr. Adv.

with Mr. Nitinjya Chaudhary,

Adv. for R – 1.

CORAM :-

THE HON'BLE MR. JUSTICE J.R. MIDHA

MAC APP.No.158/2007 & CM No.3611/2007

1. The appellant has sought the condonation of delay of 184 days in filing of this appeal. The reasons for condonation of delay have been given in para Nos. 2 to 5 of the application, which are reproduced hereunder:-

“(2) That after passing of the award dated 3.6.2006, the defending Advocate of the appellant namely Sh. Rajesh Kumar for the reasons best known to him, submitted the certified copy of the award to the appellant only on 8.9.2006.

(3) That thereafter, the insurance company/appellant sought legal opinion on the award and it was opined that the impugned award deserves to be challenged on quantum.

(3) That accordingly, the file was sent to the Regional Office for approval of filing the award.

(4) That unfortunately, the office file was kept somewhere in other records in the offices of the Company and remained untraced for a long period and despite due diligence and search, could not be searched before 25th January, 2007 and thereafter, the said file was handed over to the counsel for preparation of appeal.

(5) That the delay of 184 days as aforesaid is bonafide and unintentional and it took time for obtaining legal opinion and approval also”

2. Learned counsel for the claimant/respondent No.1 has strongly opposed the said application on the following grounds:-

- (i) The impugned award was passed on 3rd June, 2006 and the certified copy was applied by the appellant's counsel on 22nd August, 2006 which was ready on 23rd August, 2006. The period of limitation for filing the appeal expired on 3rd September, 2006. However, the appeal

was filed on 5th March, 2007 and there is delay of 184 days in filing of the appeal.

- (ii) No explanation has been given in the application about the delay on the part of the counsel to apply for the certified copy on 22nd August, 2006 and delay in handing over the certified copy to the appellant on 8th September, 2006. No affidavit of the counsel has been placed on record to explain the said delay.
- (iii) With respect to the averments made in para 4 of the application that the file of this case was kept in other records in the offices of the Company, it is not stated in which office the file was kept, nor it is stated as to from which office, it was recovered. No affidavit of the concerned Officer has been filed to indicate where the file was kept and where it was ultimately traced and that it was so traced on 25th January, 2007.

3. The learned counsel for the claimant/respondent has referred to and relied upon the following two judgments:-

(i) General Manager Northern Railway V. Vishva Nath Nangia, 118 (2005) Delhi Law Times 286(DB) -

"3. It has not been averred as to when the matter was sent to the Railway Advocate and when the opinion of the Railway Advocate was obtained; when the Railway Panel changed; when the new Advocate was appointed; when the application for certified copies was filed. In our opinion the decision to file the writ petition has not been taken with due diligence by the officers concerned so as to condone the delay in the facts and circumstances of this case. The condonation of delay is not a matter of right. The delay has to be properly explained and from the averments made in this application, we do not find any semblance of explanation tendered by the petitioner."

(ii) Commissioner of Central Excise, Chennai-II V. Customs, Excise & Gold (Control) 120 (2005) Delhi Law Times 549 DB -

"4. The case pleaded by the Applicant in the application for condonation of delay in filing the appeal it is stated that the Appellate Tribunal had passed the order on 6.3.2002, copy of which was received by the Appellant on 11.4.2002 and the Appellant had filed a reference on 25.10.2002. According to the Applicant, there is 14 days of delay in filing the present appeal being CEAC No. 19/2005. Thus, it is prayed that the delay be condoned. We find

that the averments in the application are vague and do not correctly state the facts which appear from the record before us. We may also notice here that during hearing of the case we had even called report on the case from the Registry of the Court which again shows that the facts have not been correctly mentioned in the application.

5. From the copy of the order of the Appellate Tribunal placed on record before us it is clear that the order was passed on 6.3.2002 copy thereof was ready on 26.3.2002 and there is no document on record to show that as to how the Appellant has received the copy on 11.4.2002. Even if, it is presumed in favour of the Appellant that copy was received on 11.4.2002, then they had allegedly filed the Reference in the Registry of this Court on 25.10.2002 apparently, beyond the period of limitation..... The Appellant has hardly given any satisfactory explanation for this inordinate delay. There is not even an iota of averment as to why the so-called reference application which itself was not maintainable in law, was never refiled even till date. This only shows complete callous and irresponsible attitude on the part of the Respondents in dealing with the legal matters. Wherever the Statute provides a limitation it must be construed and applied strictly as a definite right accrues to the other party on expiry of such period before the other party can be divested of such benefit there should be definite and proper explanation on record before the Court to condone the delay in filing an appeal. Condonation of delay cannot be claimed as a matter of right and such discretion should not be exercised by the Court or the authorities in a mechanical manner. Legislative intent

behind prescribing the period of limitation normally is to create a bar in institution of the proceedings upon expiry of the period except for the exceptions specifically provided in that provision itself. Delay cannot be condoned as a matter of right or on the mere asking of the party. It is expected of the Court to exercise such discretion as per settled guidelines and is inevitable for a party to show a sufficient cause while requisiting the Court to exercise such discretion in favour of the Applicant, In the case of *Shanti Devi v. State of Haryana and Ors.*, 1999 (5) SCC 703, the Supreme Court held that delay should be explained properly and sufficient cause should be shown before the Court can condone the delay.

6. We have already noticed that in the application for condonation of delay the Applicant has failed to give any plausible reasons. Similar is the position in regard to application for condonation of delay in refiling the appeal. The said application, in fact, is misconceived. The reference application was never refiled by the Applicant while the appeal in hand was filed in the Registry of this Court for the first time on 1.10.2005. Thus, this application would hardly be even maintainable. The only reason stated in the application for condonation of delay is that there was communication gap between the Counsel and the Department as a result of which necessary steps could not be taken by the Department within the period of limitation. May be the Respondents are not strictly required to explain each day of delay but they are duty bound to at least render some plausible explanation for the substantial period for which condonation is

prayed. In both these applications there is no averment as to what happened after 25.10.2002 till 1.3.2005.

7. We cannot help but to observe that conduct of the Department is not satisfactory in the present case and it also does not meet the minimum standard of administrative function in the Government department particularly when it relates to recovery of revenue. There is no cause shown much less a sufficient cause for condoning the delay. The application is vague and no satisfactory explanation has been rendered in the application which could persuade the Court to condone such a long delay in filing the appeal.

8. We dismiss these applications and consequently, the appeal does not survive for consideration being hopelessly barred by time.”

4. The averments made by the appellant in the application for condonation of delay do not constitute sufficient cause for condonation of delay. The appellant has made vague averments in the application. In para 2 of the application, no explanation has been given for the period 3rd June 2006 to 8th September, 2006. It is stated that the defending advocate of the appellant handed over the certified copy of the award to the appellant on 8th September, 2006 for the reasons best known to him meaning thereby that the

appellant is not even aware of the said reasons. This shows sheer negligence on the part of the counsel for the appellant and further shows that the appellant did not even make any effort to ascertain the reasons from the lawyer. No affidavit has been filed to explain the delay for the said period. Even after 8th September, 2006, the appellant took more than six months to file the appeal and there is no sufficient explanation for the said period also. No case of condonation of delay is made out from the application filed by the appellant.

5. Notwithstanding the bar of limitation, the case has been examined on merits. This case relates to the death of Punit Kumar Pal, aged 33 years in a road accident on 13th June, 2002. The deceased was survived by his parents who filed claim petition before the learned Tribunal.

6. The deceased was MBA(Finance) and was working as Manager(Finance) with M/s Lyka Labs Limited since January, 2001.

He was earning Rs.31,250 per month as per the salary certificate - EX-PW1/16.

7. The witness from M/s Lyka Labs Limited appeared as PW2 and proved the income and future prospects of the deceased. PW2 deposed in the witness box that if the deceased would have survived the accident, he would have become Senior Manager (Finance), GM (Finance) and thereafter Vice President (Finance) and his income would have been Rs.35,000/- per month plus other perks.

8. Despite clear evidence of income of Rs.31,250 per month and also the evidence of future prospects, the learned Tribunal took the annual income of the deceased as Rs.2,24,898/- (Rs.18,741.50 per month) on the basis of TDS certificate - EX-PW1/15. The learned Tribunal did not take the future prospects into consideration and after deducting 1/3rd towards personal expenses, took the loss of dependency of the claimants to be Rs.1,49,932/- rounded of as Rs.1,50,000/-.

9. The deceased had a permanent job. However, the learned Tribunal made an observation that it is not found whether the job was permanent, contractual or temporary. The observation of the learned Tribunal is out of context and contrary to the evidence on record.

10. The finding of the learned Tribunal that the father of the deceased was not dependent upon him because he was getting pension is contrary to the evidence on record. The father of the deceased appeared in witness box as PW1 and deposed that both the parents were fully dependent upon their son, who was contributing Rs.50,000/- per quarter (Rs.16,667/- per month) to the family. However, the learned Tribunal observed that since the father of the deceased was drawing pension, the compensation of Rs.7,50,000/-(Rs.1,50,000/- per annum) was awarded towards loss of love and affection and non-economic dependency. There is no law that the father drawing pension cannot be dependent upon his son.

11. This case is squarely covered by Section 167 of the Indian Evidence Act which is reproduced hereunder:-

“Section 167 – No new trial for improper admission or rejection of evidence –

The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.”

12. Improper admission or rejection of evidence is not by itself a ground for reversal of a decision, if there is other evidence to support it. Where admissible evidence has been improperly rejected or inadmissible evidence has been admitted by the Judge, such improper reception or rejection of evidence shall not of itself be a ground for new trial or reversal of any decision in any case, unless substantial wrong or miscarriage of justice has been thereby occasioned; or, in other words, if the Court considers that after leaving aside the evidence that has been improperly admitted,

there was enough evidence on the record to justify the decision of the lower court, or that if the rejected evidence were admitted the decision ought not have been affected thereby, no Court of appeal should set it aside.

13. An objection to the proper admission of evidence is material only if it can be shown that the exclusion of evidence improperly admitted is fatal to the decision. A finding will not, therefore, be disturbed if, throwing aside the evidence which ought not to have been admitted, there, still remains sufficient evidence to support the finding. Under Section 167 of the Evidence Act, the improper admission of evidence is not in itself ground for a new trial or reversal of decision, if independently of the evidence of improperly admitted there is sufficient evidence to justify the decision.

14. In **Owners & Parties vs. Fernando Lopez, AIR 1989 SC 2206**, the Hon'ble Supreme Court held as under:-

"Rules of procedure are not by themselves an end but the means to achieve the ends of justice. Rules of procedure are tools forged to achieve justice

and are not hurdles to obstruct the pathway to justice. Construction of a rule of procedure which promotes justice and prevents its miscarriage by enabling the Court to do justice in myriad situations, all of which cannot be envisaged, acting within the limits of the permissible construction, must be preferred to that which is rigid and negatives the cause of justice. The reason is obvious. Procedure is meant to subserve and not rule the cause of justice. Where the outcome and fairness of the procedure adopted is not doubted and the essentials of the prescribed procedure have been followed, there is no reason to discard the result simply because certain details which have not prejudicially affected the result have been inadvertently omitted in a particular case. In our view, this appears to be the pragmatic approach which needs to be adopted while construing a purely procedural provision. Otherwise, rules of procedure will become the mistress instead of remaining the handmaid of justice, contrary to the role attributed to it in our legal system." (Para 18)

15. In **Emperor vs Ermanali & Ors., AIR 1930 Calcutta 212**, Full

Bench of Calcutta High Court held as under:-

"Rules and Regulations are intended to be the handmaid and not the mistress of the law, and that in criminal proceedings it is of the utmost importance that a decision just, and reasonable on the merits should not be disturbed because in the course of the proceedings some flaw can be detected that is not fundamental and which is not proved to have worked

injustice to the accused, although it may constitute a breach of the rules of criminal procedure." (Para 33)

16. In **John vs Sherthali Municipality, AIR 1959 Kerala 323**, the

Kerala High Court held as under:-

"It is therefore clear that the learned Magistrate committed a grave error in examining the accused person without his request and against his protest, to prove a fact which the prosecution should have established by other evidence. That, however, is in my opinion, no ground to quash the entire proceedings, Section 167, Indian Evidence Act, 1872 provides inter alia that improper admission of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision. The question whether the prosecution was sustainable or the conviction was rightly made has therefore to be examined eschewing altogether the evidence furnished by the accused while under examination as a court witness."

17. The learned Tribunal improperly rejected the clear evidence of dependency of the parents of the deceased upon their son, who was contributing Rs.50,000/- per quarter (Rs.16,667/- per month) to

his parents. The father getting pension does not mean that the parents were not dependent on their son.

18. The learned Tribunal improperly omitted the evidence of future prospects of the deceased. The salary of the deceased was proved by Ex.PW1/16 to be Rs.31,250/-. The TDS certificate - Ex.PW1/15 shows that Rs.16,951/- was deducted during the relevant year towards the tax out of the taxable portion of the income. The income of the deceased for the purpose of computation of compensation has to be taken as gross salary less conveyance less Income Tax which comes to Rs.24,837/- per month. [Rs.31,250/- minus Rs.5,000/- (as conveyance) multiplied by 12 minus TDS of Rs.16,951/-]. 50% of the income of the deceased has to be added towards future prospects and the income of the deceased for computation of compensation comes to Rs.37,255.51 (Rs.24,837 + 50% of Rs.24,837/-). 50% has to be deducted towards personal expenses of the deceased and the loss of dependency of the parents comes to Rs.18,627.75 per month. By applying

multiplier of five according to the age of the parents, the loss of dependency comes to Rs.11,17,665/-.

19. The amount awarded by the learned Tribunal is on a lower side. However, since there is no cross appeal by the appellants, this issue does not need further consideration. In the facts and circumstances of this case and considering the clear evidence of the income of Rs.24,837/- per month and future prospects of Rs.12,418.50 (50% of the aforesaid income), which were improperly omitted by the learned Tribunal and also clear evidence of the parents being dependent upon the son, which has been improperly rejected by the learned Tribunal, it is held that the parents of the deceased are entitled to at least Rs.7,65,000/- awarded by the learned Tribunal towards loss of dependency. Applying Section 167 of the Evidence Act, the award of the learned Tribunal is upheld though not for the reasons mentioned therein but for the reasons stated above as there is sufficient evidence on record to justify the amount of compensation awarded by the learned Tribunal as loss

of dependency. As such, no case is made out in the appeal even on merits.

20. For all the aforesaid reasons, the appeal as well as the application for condonation of delay are dismissed.

21. Copy of this order be given 'Dasti' to learned counsel for the parties under signature of Court Master.

22. The appellant has deposited the entire amount with the Registrar General of this Court in terms of order dated 5th February, 2009. The Registry is directed to release the same in terms of the award of the learned Tribunal within four weeks.

J.R. MIDHA, J

MAY 21, 2009