

(SEE RULE 102 (1))
ARMED FORCES TRIBUNAL, KOLKATA BENCH
M.A. No.3 of 2015
With O.A (APPEAL) NO. 1/2015

THIS 21st DAY OF AUG, 2015

CORUM

HON'BLE JUSTICE DEVI PRASAD SINGH, MEMBER (JUDICIAL)

HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

APPLICANT(S) EX NO.14819251W Sep (MT) JOYDEEP BISWAS
 SON OF JITENDRA NATH BISWAS, VILL – KATANDHAR
 COLONY, POST + PS – BISHBUPUR, DIST BANKURA
 (WEST BENGAL) PIN 722 122Applicant
 -versus-

RESPONDENT(S)

1. The Union of India through the Secretary
 Min of Defence, Government of India,
 Ministry of Defence, Sena Bhawan
 New Delhi – 110 150
2. The Chief of the Army Staff
 Army Headquarters
 Integrated HQ of MoD (Army)
 Defence Head Quarters,
 New Delhi - 110011.
3. The General Officer Commanding in Chief,
 Head Quarters Northern Command
 C/o 56 APO, Udhampur,
 Jammu and Kashmir
4. The Commanding Officer No.2
 Training Battalion (Supply), ASC Centre (South)
 C/o ASC Centre & College,
 PIN – 900 493 C/o 56 APO
5. The Commanding Officer Training Battalion,
 ASC Centre (South), C/o ASC Centre & College,
 Karnataka C/o 56 APO Bangalore 560 007

....Respondents

For the petitioner (s) Ms Manika Roy, Advocate

For the respondents Mr. S.K. Bhattacharyya, Advocate

ORDER

Per Justice Devi Prasad Singh, Member (Judicial):

The present M.A. has been filed by the applicant for condonation of delay in preferring the present OA bearing No.1 (Appeal) of 2015. In brief, the facts of the present application is discussed hereinafter.

2. The applicant was enrolled in the Indian Army on 7th July 2000 . He had been dismissed by Summary Court Martial on account of overstaying the leave by an Order dated 24th September, 2005. The present application has been preferred in January, 2015.

3. It is an admitted fact on record that the applicant was enrolled in the Indian Army on 7th July 2000. The applicant was granted 10 days Casual Leave in the month of December, 2002 in terms of leave certificate dated 19th December, 2002. It has been alleged by the applicant that in 2003 he made a request for 30 days Annual Leave, which was alleged to have been confirmed by the Lt. Col. Thereafter, he reported to duty on 6th May, 2003. Though there is no evidence on record, but it is submitted that he was required by the Transit Camp No.213, and he reached at ASC Centre on 6th May, 2003 and tried to surrender. According to the applicant he was not permitted to resume duty. However this seems to be not proved by the trust worthy evidence. According to the applicant's counsel, he received a letter dated 23-3-2005 from ASC Records (South) and in consequence thereof he surrendered on 21-4-2005 at Head Quarter Wing, ASC Centre and College. Vide order dated 24-9-2005 he was dismissed from service. From the

materials on record it appears that the applicant submitted an application in response to which vide letter dated 23-5-2005 (Annexure A4 to the OA) he was informed that he has been declared as deserter from field area with effect from 23 Jan 2003 and in case he desires to rejoin voluntarily from desertion he may do so by reporting to Depot Coy ASC Centre (South) & College Bangalore-7.

4. From the materials on record it does not inspire confidence that the applicant tried to resume duty in June 2003 (supra) and in case he tried and failed to resume duty, then why he had not forwarded any statutory complaint against the inaction on the part of Army Personnel? Why he resumed duty only after receipt of letter dated 23-5-2005 (supra). It shows that the applicant does not have any interest in Army Service right from the beginning. He tends to seek leave on one or the other ground. It has been submitted by Ms Manika Roy, the learned counsel for the applicant that the applicant submitted the Mercy Petition dated 21-7-2014, which was rejected by an order dated 10-11-2014 by the GOC-in-C, Southern Command on the ground that the application is highly belated. It is the applicant who overstayed leave without any justified ground. The relevant portion of the letter dated 28th October, 2014 is as under :

“2. Number 14819251W Ex Sepoy/Mechanical Transport Joydeep Biswas of 519 Army Service Corps Battalion attached with Number 2 Training Battalion (Supply) Army Service Corps Centre (South), was arraigned on a charge under Army Act Section 39(b) for WITHOUT SUFFICIENT CAUSE OVERSTAYING LEAVE GRANTED TO HIM’. In that “he at field, on 23 January 2003, having been granted

leave of absence for 30 days wef 24 December 2002 to 22 January 2003, failed without sufficient cause to rejoin his unit on 23 January 2003 (F/N), on expiry of the said leave and continued overstaying leave till he voluntarily surrendered at Headquarter Wing, Army Service Corps Centre (South), C/o Army Service Corps Centre and College, Bangalore on 21 April 2005. The petitioner pleaded 'Guilty' to the charge. The officer holding the trial on 24 September 2005, after due compliance of Army Rule 115 (2)/(2a), found him guilty and accordingly sentenced him to be dismissed from the service.

4. Perusal of record reveals that the Summary Court Martial proceedings have been conducted following all due procedures of law under Army Act and Army Rules. There is no infirmity in the Summary Court Martial proceedings which would warrant any interference. Considering the nature and gravity of the offence involving prolonged absence of 820 days, the punishment awarded is just and legal. The reasons for the prolonged absence now stated in the petition is contrary to his earlier statement during recording of Summary of Evidence wherein, he claims that he was accepted by 213 Transit Camp and sent to his unit, which proved to be false. The grounds now urged without any corroborating material is established to be an afterthought. The Petitioner absented himself without any valid reason, which is not acceptable in a disciplined force. Hence, setting aside the punishment awarded to such an indisciplined individual is not in the organizational interest and would be detrimental to the maintenance of discipline in the Army. The Petitioner has not brought out any humanitarian ground which warrants mercy on the sentence awarded by the Summary Court Martial. Apart from merits, the petitioner has not submitted any reasons for the long unexplained delay of about nine years in submitting the petition. The present petition is thus liable to be rejected on account of delay and laches.”

5. Subject to aforesaid backdrop, the applicant had preferred the present application for condonation of delay. It has been stated by the applicant that he was not permitted to resume duty in June 2003. It has been stated in para 7 of the present MA that he failed to resume duty because of the illness of his mother and the illness became critical and continued for a longer period. Physical illness of the applicant's mother had a toll on her mental health and thereby he gradually also became mentally handicapped and which multiplied applicant's agony. Further, the wife, viz. Puspa Biswas distanced herself from matrimonial union due to unemployment of her husband. It is also stated that in 2011 on account of father's kidney problem, the applicant could not move to file the petition. He submitted mercy petition on 21-7-2014, in response to which he received a rejection order (supra).

6. From the material facts on record, it appears that the applicant has not explained the fact with materials trust worthy evidence of the period from 2003 to 2005, when he was permitted to resume duty. Once the applicant was declared deserter in 2003, then there was no option with the respondent to make any communication or request during the later period for resumption of duty.

7. The applicant did not submit any proof about the illness of his father and mother, which may inspire confidence. Even otherwise in case his wife deserted him, it was because of his own conduct. The services in Army requires discipline and hard working. In case the applicant would not have avoided to discharge duty in Army by taking leave or overstaying the leave,

the wife would not have left him. It appears that because of climatic condition and hardship which an army personnel faces while working in J&K, the applicant deliberately overstayed the leave, though the findings of deliberate and overstaying the leave for years makes out a case to draw inference that the Army Personnel concerned is not tough enough to face the hardship of serving in the Army.

8. No material has been brought on record to explain the day to day events in preferring the present OA. The total period of ailments of father and mother of the applicant and of himself has not been pleaded in the MA. It shows that the applicant has moved the application for the purpose of condonation of delay, when almost 9 years have passed. Such deliberate attempt on the part of the applicant seems to be unfair practice. Pleadings must be based on correct disclosure of fact and instead of concocted fact. Such action seems to be abuse of process of law. It seems that the respondent authorities has rightly rejected the Mercy Petition by not contending the delay and according to merit as discussed elaborately.

9. The learned counsel for the applicant had invited our attention to the case of **State of Haryana vs Chandra Mani (1996 AIR 1623)**, where the Hon'ble Supreme Court while considering the application for condonation of delay opined that every day's delay must be explained does not mean that a pedantic approach should be made. The doctrine must be applied in a rational common sense pragmatic manner. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserved to be preferred for the other side cannot claim

to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. There is no dispute over the proposition of law that the delay in filing the application depends on various factors which included commission and omission on the part of the applicant/petitioner. On the ill-advice of the Counsel with certain assurance, even when there is no explanation, changing of mind to approach the Court/Tribunal with some expectation on the assurance given, the Court should be cautious in passing the orders in the matter of condonation of delay that too when a petition is preferred almost after a decade, which depends on the facts and circumstances of each case.

10. Section 5 of the Limitation Act deals with sufficient cause. Though liberal approach should be adopted for the purpose of condonation of delay but in case the delay caused in filing of the application or appeal is inordinate then the Court/Tribunal should see that entire period of delay has been explained and while allowing or rejecting, a reasoned order should be passed. Applicant has not disclosed the period when the wife left and mother and father were ill including his own illness. In the absence of specific disclosure of period of illness of respective persons, no inference may be drawn with regard to genuineness on account of factual foundation for the condonation of delay.

11. In **AIR 1960 SC 260- Sitaram Ramcharan and others Vs. M.N. Nagrashana Authority** Hon'ble Supreme Court held that "sufficient cause must cover the whole period of delay". It shall be incumbent upon the party to satisfy the court that he had sufficient

cause for not preferring the appeal or making application within prescribed time. Relevant portion from the case of Sitaram Ramcharan (supra) is reproduced as under:-

“It cannot be disputed that in dealing with the question of condoning delay under S.5 of the Limitation Act the party has to satisfy the Court that he had sufficient cause for not preferring the appeal or making the application within the prescribed time, and this was always been understood to mean that the explanation has to cover the whole of the period of delay.”

12. In another case reported in **AIR 1969 SC 575- Shakuntala Devi Jain Vs. Kuntal Kumari and others** Hon'ble Supreme Court held that the word “sufficient cause” should receive liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bonafides is imputable to the appellant. If the appellant makes out sufficient cause for the delay, the court may in its discretion condone the delay. For convenience relevant portion from the case of Shakuntala Devi Jain (supra) is reproduced as under:-

“The next question is whether the delay in filing the certified copy or, to put it differently, the delay in re-filing the appeal with the certified copy should be condoned under Section 5 of the Limitation Act. If the appellant makes out sufficient cause for the delay the Court may in its discretion condone the delay. As laid down in Krishna Vs. Chathappan, (1890) ILR 13 Mad 269, 271 “Section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words “sufficient cause” receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bonafides is imputable to the appellant.

13. In the case reported in **AIR 1974 SC 650- Balbir Singh Vs. Bogh Singh** where the prosecution filed appeal in wrong court Supreme Court held that delay should be condoned in preferring the appeal before the appropriate forum.

14. In the case reported in **AIR 1972 SC 749- State of W.B. Vs. The Administrator, Howrah Municipality and others etc.** the Hon'ble Supreme Court held that sufficient cause should receive liberal construction so as to advance substantial justice when no negligence or inaction or want of bonafide is imputable to a party.

15. In a case relied upon by the petitioner's counsel reported in **1987 (2) SCC 107- Collector, Land Acquisition, Anantnag and others Vs. Mst. Katiji and others** their Lordships of Apex Court held that court should adopt liberal and justice oriented approach for the purposes of condonation of delay. Relevant portion from the case of Mst. Katiji (supra) is reproduced as under:-

"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 realized 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 malafides. 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 legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

16. In another case reported in **1994 (Supp.) 2 SCC 195- Ex. Capt. Harish Uppal Vs. Union of India and others** where the controversy was relating to entertainment of a petition filed under Article 226 of the Constitution of India the Hon'ble Supreme Court held that parties should pursue right promptly and not sit over their rights. The party could not be permitted to sleep over their rights and choose to avail the remedy after inordinate delay. Relevant portion from the case of Ex. Capt. Harish Uppal (supra) is reproduced as under:-

“It is a well settled policy of law that the parties should pursue their rights and remedies promptly and not sleep over their rights. That is the whole policy behind the Limitation Act and other rules of limitation. If they choose to sleep over their rights and remedies for an inordinately long time, the court may well choose to decline to interfere in its discretionary jurisdiction under Article 226 of the Constitution of India – and that is what precisely the Delhi High Court has done. We cannot say that the High Court was not entitled to say so in its discretion.”

17. However, in one another judgment reported in **1997 (7) SCC 556- P.K. Ramachandran Vs. State of Kerala and another** their Lordships has cautioned the High Court not to condone the delay in a mechanical manner while deciding the issue relating to application filed under Section 5 of the Limitation Act. Relevant portion from the case of P. K. Ramachandran (supra) is reproduced as under:-

“3. It would be noticed from a perusal of the impugned order that the court has not recorded any *satisfaction* that the explanation for the delay was either *reasonable* or *satisfactory*, which is an essential prerequisite to condonation of delay.”.....

“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 extent 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.”.....

18. In the case of P.K. Ramachandran(supra) their Lordships of Apex Court had declined to condone the delay of 565 days on the ground that appellant had failed to explain the day to day delay in filing the appeal.

19 In a judgment reported in **2005(8) SCC 709-State of Karnataka Vs. Lamuman** the Lordship of Hon’ble Apex Court had declined to extend the benefit of Section 5 of the Limitation Act where rights of party have been extinguished by a fiction of law in a land acquisition matter.

20. In another case reported in **2006 LCD 373-P.Mani Moopnar Vs. K. Rajammal and others** Hon’ble Supreme Court held that sufficiency of cause must be shown before condoning the delay more

so when it is inordinate delay of 2598 days.

21. In a case reported in **2001 (6) SCC 176; M.K. Prasad Vs. P. Arumugam**, the Hon'ble Supreme Court held that while construing the provisions of Section 5 of the Limitation Act we should keep in mind that after expiration of the period of limitation prescribed for filing an appeal, a right is created in favour of decree holder to treat the decree as binding and that is why discretion to condone the delay has been given to the Courts. Relevant portion from the judgment of M.K. Prasad (supra) is reproduced as under:-

"In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be lightly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice."

22. Again their Lordships in the case of M.K. Prasad (supra) proceeded to hold as under:-

"Again in *State of W.B. v. Administrator, Howrah Municipality* and *G.Ramegowda, Major v. Special Land Acquisition Officer* this Court observed that the expression "sufficient cause" in Section 5 of the Limitation 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. Law of limitation has been enacted to serve the interests of justice and not to defeat it. Again in *N.Balakrishnan v. M. Krishnamurthy* this Court held that acceptability of explanation for the delay is the sole criterion and length of delay is not relevant. In the absence of anything showing mala fide or deliberate delay as a dilatory tactic, the court should normally condone the delay."

23. However, reiterating the same principle in a case reported in

2003(11) SCC 728; Bhagmal v. M.P. Cooperative Marketing & Consumer Federation Ltd. and others, the Hon'ble Supreme Court proceeded to hold as under:-

“Normally the High Courts would be wary in interfering with an order passed in the exercise of a discretion conferred by law particularly when such discretion was exercised to enable a party to pursue his statutory remedy or appeal. No doubt the discretion has to be exercised judicially. There is again no doubt that the delay in filing the appeal was apparently very long. Nonetheless the High Court in exercising writ jurisdiction should have been slow to upset a benefit granted to a party in having his statutory remedy to be pursued by condoning the delay albeit its length.”

24. In a judgment reported in **2005 (3) SCC 752; State of Nagaland Vs. Lipok AO and others**, the Hon'ble Supreme Court while reiterating the aforementioned principle held that proof of sufficient cause is condition precedent for the exercise of extraordinary restriction vested in the court. Length of delay in filing the appeal or revision is not material but the sufficiency of cause and shortness of delay is one of the circumstances which will be taken into account. Relevant portion from the judgment of Lipok AO (supra) is reproduced as under:-

“The proof of sufficient cause is a condition precedent for exercise of the extraordinary restriction (*sic* discretion) vested in the court. What counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. In *N. Balakrishnan Vs. M. Krishnamurthy* it was held by this Court that Section 5 is to be construed liberally so as to do substantial justice to the parties. The provision contemplates that the court has to go in the position of the person concerned and to find out if the delay can be said to have resulted from the cause which he had adduced and whether the cause can be recorded in the peculiar circumstances of the case as sufficient.”.....

25. In the case of Lipok AO (supra) the Hon'ble Supreme Court after considering its earlier pronouncements relating to the determination of the sufficient cause held that the sufficient cause must be bonafide and filing of time barred appeal, revision or application is not merely a device to cover an ulterior purpose. Relevant portion from the judgment of Lipok AO (supra) is reproduced as under:-

“9. What constitutes sufficient cause cannot be laid

down by hard-and-fast rules. In *New India Insurance Co. Ltd. v. Shanti Misra* this Court held that discretion given by Section 5 should not be 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 *Brij Indar Singh v. Kanshi Ram* it was observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. In *Shakuntala Devi Jain v. Kuntal Kumari* a Bench of three Judges had held that unless want of bona fides of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

10. In *Concord of India Insurance Co. Ltd. v. Nirmala Devi* which is a case of negligence of the counsel which misled a litigant into delayed pursuit of his remedy, the default in delay was condoned. In *Lala Mata Din v. A. Narayanan* this Court had held that there is no general proposition that mistake of counsel by itself is always sufficient cause for condonation of delay. It is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose. In that case it was held that the mistake committed by the counsel was bona fide and it was not tainted by any mala fide motive."

26. It is settled law that Court can iron out the fabric but it cannot change the texture of fabric. It cannot enlarge the scope of the legislation or the intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It is well settled that the real intention of the legislature must be gathered from the language used. (vide **2003 (2) SCC 577; Nasiruddin and others Vs. Sitaram Agarwal**)--**Limitation**

27. In a case reported in **2007 (11) SCC 402, State of Rajasthan Vs. Chanda @ Chandkori and Ors.**, Hon'ble Supreme Court had held that in case delay causes grave injustice to parties ordinarily it should not be condoned.

28. In a case reported in **2008 (17) SCC 448, Pundlik Zalam Patil Vs. Executive Engineer Jalgaon Medium Project**, their Lordship of Hon'ble Supreme Court held that limitation may be extended with regard to public authorities only in case of proved acts of fraud or

collusion on the part of its officers or agents. Otherwise the law of limitation is same for citizen and for government authorities. Their Lordship further held that limitation should not be extended where a false and incorrect fact is placed on record. The incorrect statement made in an application seeking condonation of delay itself is sufficient to reject an application without further enquiry. In the present case, while moving the application for condonation of delay the applicant had concealed material facts with regard to date of communication of order by the Advocate and also not disclosed that why appeal has not been filed for about seven months and what happen during the the course of one year before the State granted approval to file the appeal.

29. In **AIR 2009 SC 664, Noharlal Verms Vs. District Cooperative Central Bank Ltd** held that in case suit, appeal or application is beyond limitation, court or adjudicating authority has no jurisdiction to entertain the same. Even if question with regard to limitation is not raised. Court has an independent duty to look into except of limitation. 2008 (14) SCC 582, State (NCT **Legal fiction----** Cannot be extended so as to transgress the scope and purport for which it is created---Deeming clause: **2008 AIR SCW 2526: UCO Bank and another. Vs. Rajinder Lal Capoor.**

30. It appears that the applicant had filed the application on unfounded and concocted grounds, hence amount to abuse of process of law.

31. It is a fit case where in view of law settled by Hon'ble Supreme Court exemplary cost should be awarded vide **Salem Advocate Bar Association, Tamil Nadu v. Union of India, AIR 2005 SC 3353, Ramrameshwari Devi and others v. Nirmala Devi and others, (2011) 8 SCC 249, A. Shanmugam v. Ariya Kshetriya Rajakula Vamsathu Madalaya Nandhayana Paripalanai Sangam represented by its President and others, (2012) 6 SCC 430.** Keeping in view

the seriousness of allegations pleaded in the writ petition matter requires to be referred for investigation by appropriate agency like Vigilance Department. The writ petition deserves to be allowed.

32. Accordingly, the MA is rejected and we decline to condone the delay, with cost quantified to Rs2000/-. The cost should be deposited before the Armed Forces Tribunal, Kolkata Bench within 2 weeks and be remitted to the AFT Bar Association, Kolkata by the Registry. Since the delay has not been condoned, the OA is also dismissed without going into the controversy or merit of the case.

(Lt Gen Gautam Moorthy)
Member(Administrative)

(Justice Devi Prasad Singh)
Member(Judicial)
