

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Court No. 36

Crl. Misc. Writ Petition No. 21733 of 2008

Parvez Parwaz & another vs. State of U.P.

Hon'ble Ramesh Sinha, J.

Hon'ble Umesh Chandra Srivastava, J.

(Delivered by Hon'ble Ramesh Sinha, J.)

Order on Crl. Misc. Restoration/Recall Application No. 428513 of 2015 along with Crl. Misc. Delay Condonation Application No. 428510 of 2015.

1. Heard Sri S.F.A. Naqvi, learned counsel for the applicants-petitioners, Sri Vimlendu Tripathi, learned Officiating Government Advocate assisted by Sri Ashish Pandey, learned A.G.A. for the State.

2. On 24.3.2017, an order was passed by this Court on the present restoration/recall application which is quoted hereinbelow:-

"Order on Crl. Misc. Recall/Restoration Application No.428513 of 2015

1. Heard Sri S.F.A. Naqvi, learned counsel for the petitioners, Sri Ashish Pandey, learned A.G.A. for the State and perused the material brought on record.

2. The present writ petition has been filed by the petitioners and petitioner no1 is the informant of the case.

3. It appears from the order sheet of the present writ petition that the present writ petition came up as fresh matter before another Bench of this Court on 3.12.2008, on which date following order was passed by another Bench of this

Court, which is quoted here-in-below:-

"List on 15th December, 2008.

Learned AGA may seek instructions in the matter in the meanwhile"

4. On 15.12.2008, another Bench of this Court passed an order which is quoted here-in-below:-

"Learned AGA prays for and is allowed 10 days' time for filing a counter-affidavit.

List in the second week of January, 2009, to enable the learned A.G.A. to file the counter-affidavit."

5. On 29.4.2009 the present writ petition was dismissed for want of prosecution by another Bench of this Court, which is quoted here-in-below:-

"List revised.

No one has appeared on behalf of the petitioner to press this petition.

The petition is accordingly dismissed for want of prosecution.

Interim order, if any, is also vacated."

6. It further transpires from the record that a Crl. Misc. Restoration Application No.127836 of 2010 along with Crl. Misc. Delay Condonation Application No.127833 of 2010 dated 28.4.2010 was filed by the petitioners for restoring the said writ petition.

7. On 20.3.2015, another Bench of this Court passed an order which is quoted here-in-below:-

"Heard the learned counsel for the petitioners and the learned A.G.A. for the State of U.P. The learned A.G.A. prays for and is granted two weeks time to file counter affidavit explaining therein as to why the delay in filing the restoration application may not be condoned.

List on 10.4.2015"

8. On 10.4.2015 another Bench of this Court passed an order which is as under:

Learned A.G.A. submits that it appears that the order dated 20.3.2015 could not be communicated.

He has noted the order today.

List immediately after three weeks."

9. On 13.7.2015 another Bench of this Court passed an order which is quoted here-in-below:-

Learned counsel for the petitioners prays for and is allowed two weeks' time to file a supplementary affidavit disclosing therein whether the investigation in the matter has been completed or is still pending.

List this case on 30.7.2015."

10. It appears that on 30.7.2015 another Bench of this Court rejected the aforesaid Delay Condonation Application as well as Restoration Application by passing the following order, which is as under:-

CrI. Misc. Delay Condonation Application No.127833 of 2010

List has been revised.

None appears to press this application.

Accordingly, this application is rejected for want of prosecution.

Criminal Misc. Restoration Application No. 127836 of 2010.

Since the Delay Condonation Application has been rejected for want of prosecution, this application is also rejected. "

11. After dismissals of the aforesaid Delay Condonation Application as well as Restoration Application filed by the petitioners, the present Recall/Restoration Application along with the Delay Condonation Application dated 13.12.2015 has been filed in the present petition for recalling of the Court's order dated 30.7.2015, which was directed to be listed with previous papers by another Bench of this Court vide order dated 22.12.2015 which is pending disposal.

12. On 6.12.2016, this Court passed an order which is quoted here-in-below:-

"Heard S.F.A. Naqvi, learned counsel for the petitioners and Sri Ashish Pandey, learned A.G.A for the State.

Learned A.G.A is directed to inform this Court about the status of the investigation in this matter by the next date.

List this matter on 20.12.2016."

13. The matter again came up before this Court on 13.1.2017 and this Court passed the following order:-

"Case is passed over on the illness slip of Sri S.F.A. Naqvi, learned counsel for the petitioners.

Sri Irshad Husain, learned A.G.A. is present on behalf of the State."

14. On 10.3.2017 this Court passed the following order which is quoted as under:-

Sri S.F.A. Naqvi, learned counsel for the petitioners and Sri Ashish Pandey, learned A.G.A. for the State are present.

Sri S.F.A. Naqvi, learned counsel for the petitioners has stated that he has received counter affidavit from the State, wherein it has been stated that the sanction to prosecute the accused persons in the present case from the Competent Authority is still awaited but it appears from the record that the counter affidavit which has been filed by the State is not on record.

Sri Ashish Pandey, learned A.G.A. for the State is directed to inform this Court on which date he has filed the said counter affidavit.

List the matter in the next cause list."

15. Today, the matter is listed in the Daily Cause List at Serial No.71 for disposal of the present Delay Condonation Application along with the Restoration Application.

16. It appears from the record the present writ petition was dismissed for want of prosecution on 29.4.2009 by another Bench of this Court and to recall the said order, a Crl. Misc. Restoration Application No.127836 of 2010 along with Crl. Misc. Delay Condonation Application No.127833 of 2010 was filed and the same was dismissed by another Bench of this Court on 30.7.2015 and the present Recall/Restoration Application along with Delay Condonation has been filed to recall the order dated 30.7.2015 passed by another Bench of this Court in Crl. Misc. Restoration Application No.127836 of 2010 and Crl. Misc. Delay Condonation Application No.127833 of 2010 to its original number, but there appears to be no prayer made in the present Recall/Restoration Application for recalling of the order dated 29.4.2009 passed by this Court by which the present writ petition was dismissed for want of prosecution and restoring the writ petition to its original number. Hence, the prayer made in the present Recall/Restoration Application appears to be defective one.

17. Sri Naqvi, learned counsel for the petitioners states that there appears to be three affidavits of compliance have been filed by learned AGA for the State, i.e.,(i) dated 24.4.2015 of Sri Bhushan Upadhyay, (ii) Dated 17.12.2016/23.12.2016 of Sri Anand Narain Singh, Inspector C.B.C.I.D., Gorakhpur Sector Gorakhpur & (iii) Dated 20.2.2017/ 7.3.2017 of Sri Anand Narain Singh, Inspector C.B.C.I.D., Gorakhpur Sector Gorakhpur and further a supplementary affidavit dated 18.12.2015 has also been filed by the petitioners in the present matter.

18. As per the Officer report, an affidavit of compliance dated 23.12.2016 numbered as 401875 of 2016 and other affidavit of compliance dated 7.3.2017 numbered as 80688 of 2017 have been placed on record and the same are available on record, but the affidavit of compliance which has been referred by learned counsel for the petitioners, i.e., dated 24.4.2015 of Sri Bhushan Upadhyay and supplementary affidavit dated 18.12.2015 filed by the petitioners are not on record.

19. Learned counsel for the petitioners has made submissions on merits of the case but to consider the said submissions and adjudicate upon the merits of the case, it is first necessary to dispose of the Crl. Misc. Delay Condonation Application No.428510 of 2015 along with the present Crl. Misc. Recall/Restoration Application No.428513 of 2015 but the prayer made in the said Recall/Restoration Application appears to be a defective one. The petitioners may amend the prayer of the present Recall/Restoration Application by the next date, if so desires.

20. As the affidavit of compliance of Sri Bhushan Upadhyay dated 24.4.2015 filed by the

learned AGA as referred by the learned counsel for the petitioners and supplementary affidavit filed by the petitioners dated 18.12.2015 are not on record. Hence, Office is directed to trace out the same and place it on record.

21. List the matter after three weeks for disposal of the present Delay Condonation Application along with the present Recall/Restoration Application."

3. The matter again came up before this Court on 28.4.2017 on which date following order was passed:-

"An amendment application as well as supplementary affidavit have been filed today by learned counsel for the petitioners which are taken on record.

Heard Sri S.F.A. Naqvi, learned counsel for the petitioners and Sri Ashish Pandey, learned A.G.A. assisted by Sri Imran Saiyed, learned Brief Holder for the State.

Learned counsel for the petitioners submits that on 24.3.2017, the matter was heard by this Court on the recall/restoration application as well as on merit but due to some defect in the prayer of recall/restoration application, amendment was required in the prayer of recall/restoration application, hence he has filed the amendment application today. He prays that the same may be allowed.

Considering the submissions advanced by learned counsel for the petitioners and the averments made in the amendment application, the amendment application filed in CrI. Misc. Recall/Restoration Application No. 428513 of 2015 is hereby allowed.

Office is directed to allot regular number to it.

Learned counsel for the petitioners is directed to make necessary amendment in the said recall/restoration application during the course of the day.

Considered the submissions advanced by learned counsel for the parties and perused the record.

From a perusal of the record, it appears that the matter of sanction regarding prosecution of the accused persons is pending before the State Government and the question of grant of sanction for prosecution is to be decided by the Head of the State Government, who himself is a prime accused in the present F.I.R. lodged by petitioner no. 1.

As the said question which has crop up in the matter before this Court requires proper adjudication, learned counsel for the parties are directed to assist the Court in the matter on the next date fixed by placing legal proposition of law in the matter.

Put up the matter for further argument on 4.5.2017. "

4. Today, Sri Vimendu Tripathi, learned Government Advocate has opposed the restoration application on the ground that the reason given for condoning the delay in filing the present restoration application by the applicants-petitioners is wholly vague, hence the same may be dismissed on this ground alone. In support of his argument, he has placed reliance on the judgment of the Apex Court in the case of Basawaraj and another vs. Special Land Acquisition Officer reported in (2013) 14 SCC 81 and further an unreported judgment of Division Bench of this Court in the case of Ram Sharan Singh son of Laxmi Singh vs. Union of India decided on 17th September, 2007.

5. Learned counsel for the applicants-petitioners vehemently opposed the said contention of learned Government Advocate and submitted that though the present petition was dismissed for want of prosecution on 29.4.2009 by this Court but there is no fault of the applicants-

petitioners as his clerk could not mark the same in the cause list on account of which he could not appear in the matter on the said date, hence the petition was dismissed for want of prosecution due to inadvertent mistake of his clerk. He submits that on 27.4.2010 when the applicants-petitioners visited Allahabad and contacted him to know the status of the case, he made an enquiry on which it came in his knowledge that the present case was dismissed for want of prosecution on 29.4.2009 prior to it they had no knowledge about dismissal of the present petition. A copy of the computer enquiry report has been annexed as Annexure-1 to the affidavit filed in support of the application. He submits that as soon as the applicants-petitioners came to know about the dismissal of the present petition for want of prosecution, they filed a restoration application on 29.4.2010. He submits that there is no deliberate delay in filing the restoration application which was filed by them on 29.4.2010 which was ordered to be listed with previous papers on 3.5.2010 by the Court. He submits that the said restoration application no. 127836 of 2010 along with delay condonation application no. 127833 of 2010 was also dismissed for want of prosecution on 30.7.2015 by this Court as his clerk again could not mark the same, hence he could not appear on the said date to press restoration application.

6. The applicant-petitioner no. 1 came to know about the order dated 30.7.2015 of this Court only on 12.12.2015 when he contacted his counsel, who on enquiry about the status of the case from the website of this Court came to know about dismissal of the restoration application. On coming to know about the dismissal of the same, the applicant-petitioner no. 1 came to Allahabad on 13.12.2015 and moved the present restoration application along with delay condonation application which was filed in the Registry of this Court on 18th December, 2015.

7. On 22.12.2015, the present restoration application along with delay condonation application was directed to be listed with previous papers by the Court.

8. Learned counsel for the applicants-petitioners submits that the petition and restoration application of the applicants-petitioners were rejected because of inadvertent mistake on the part of his clerk and there has been no deliberate negligence on the part of the applicants-petitioners for pursuing the petition and due to the act of the counsel and his clerk, the applicants-petitioners cannot be made sufferer. He submit that the nature of offence stated in the F.I.R. which has been registered as case crime no. 2776 of 2008 under Sections 153, 153A, 153B, 295, 295B, 147, 143, 395, 436, 435, 302, 427, 452 I.P.C. and 7 C.L.A. Act, police station Cantt., District Gorakhpur against the accused persons is the offence against the society as innocent people were killed in the communal riots at Gorakhpur on 27.1.2007 because of inflammatory speeches given by the accused persons against whom the petitioner no. 1 has lodged the present F.I.R. There are 28 other criminal cases for different offences registered in District Gorakhpur against the accused persons by the different persons besides the present case. He pointed out that out of 29 cases including the present case in 20 cases charge-sheet has been submitted, in six cases final report has been filed and in three matters are under investigation. He submits that out of three cases in which investigation is pending in two cases permission for prosecution has been sought for by the State Government, hence the delay condonation application filed in support of the restoration applications may be allowed by this Court for doing substantial justice.

9. Considered the submissions advanced by learned counsel for the parties and perused the

restoration application as well as delay condonation application filed in support of the same.

10. It appears from the record that the present petition has been filed by the applicants-petitioners in the year 2008 and on 3.12.2008, learned A.G.A. was directed to seek instructions in the matter. Thereafter the same was dismissed for want of prosecution on 29.4.2009 by this Court and a restoration application along with delay condonation application has been filed by the applicants-petitioners on 29th April, 2010 after coming to know about the dismissal of the petition for want of prosecution on 27.4.2010. It is very painful to note that the restoration application which was filed by the applicants-petitioners along with delay condonation application was also dismissed for want of prosecution on 30.7.2015 by this Court and the reason given by the learned counsel for the applicants-petitioners that due to inadvertent mistake of his clerk, who could not mark the case when it was listed, appear to be a casual one. Such a casual approach of learned counsel for the applicants-petitioners in pursuing the case of the applicants-petitioners cannot be appreciated and the applicants-petitioners may not be put at fault for the same. When the said conduct was pointed out to the applicants-petitioners' counsel Sri Naqvi, he could not give a satisfactory reply but apologies for the same on his behalf as well as on behalf of his clerk and prays that the Court may consider the gravity of the case and allow the restoration application along with delay condonation application exercising its discretion in the matter to do the substantial justice.

11. The case laws which have been cited by the learned counsel for the State, i.e., Basawaraj & another (Supra) of the Apex Court on the issue of condoning the delay shows that the facts and circumstances of said case is distinguishable to that of the instant case as the said case pertains to civil appeal in which a statutory period of limitation has been prescribed and in the said case, the Apex Court has held that the party acted with negligence, lack of bona fides or inaction then there cannot be any justification for condoning the delay and the High Court has rightly dismissed the restoration application along with delay condonation application and upheld the judgment of the High Court.

12. From a perusal of the said judgment it is further evident that the Apex Court has also laid down the proposition of law for condoning the delay in paras-11, 12, and 14 of the aforesaid judgment and has held that the discretion to condone the delay to be exercised judiciously based on the facts and circumstances of each case, 'sufficient cause' cannot be liberally interpreted if negligence, inaction or lack of bona fides is attributed to the party even though limitation may harshly affect rights of a party but it has to be applied with all its rigor when prescribed by statute, courts have no choice but to give effect to the same. Result flowing from statutory provision is never an evil, inconvenience not ground for interpreting a statute, Courts do not have power to extend period of limitation based on equitable grounds, If courts start substituting period of limitation then it would amount to legislation, which is impermissible. It further observed by the Apex Court that the Court starts condoning the delay where no sufficient cause was made out by imposing conditions then that would amount to violation of statutory principles and showing utter disregard to Legislature.

13. The Apex Court observed that in Section-5 of the Limitation Act, the delay can be condoned when 'sufficient cause' is shown-'Sufficient cause' means, it held that distinction between 'sufficient cause' and 'good cause'-it held, 'sufficient cause' means a cause for which a party could not be blamed for his absence. A party should not have acted with negligence or

lack of bona fides- Degree of proof is less in case of good cause whereas it is high in case of "sufficient cause.

14. Moreover, the Apex Court in the case of Rafiq and another vs. Munshilal and another reported in AIR 1981 SC 140 and in the case of Smt. Lachchi and others vs. Director of land records and others while dealing with the similar issue, the Apex Court held that a litigant cannot suffer for the fault of his counsel. The Hon'ble Supreme Court in the former case observed as under:-

"What is the fault of the party, who having done everything in his power expected of him, would suffer because of the default of his advocate.... The problem that agitates us is whether it is proper that a party should suffer of the inaction, deliberate omission, or misdemeanour of his agent..... We cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted."

15. Thus, the proposition of law settled from the aforesaid judgments of the Apex Court, it is apparent that the Courts are left to its discretion to condone the delay. It is further clear from the aforesaid judgments that while condoning the delay, the discretion of the Court to condone the delay has to be exercised judicially based on the facts and circumstances of each case.

16. In the instant case, there appears to be no negligence on the part of the applicants-petitioners nor lack of bona fides or inaction is reflected and only on account of the fault on the part of their counsel and his clerk, the petition was dismissed for want of prosecution for which he has filed a restoration application as soon as he came to know from his counsel which was also dismissed for want of prosecution due to the mistake of clerk of their counsel. The applicants-petitioners are not at fault, hence they may not be allowed to suffer because of the fault on the part of their counsel and his clerk, hence the cause shown is sufficient..

17. The case laws which have been cited by the learned Government Advocate referred above on the facts and circumstances cannot be made applicable to the present case but the proposition of law laid down in it is not disputed.

18. Moreover, we find that the F.I.R. which has been lodged by the applicant-petitioner no. 1 shows that the incident is of the year 2007 where communal riots broke in the city of Gorakhpur in which several innocent persons have lost their lives and were injured. It is a crime against the society and the persons responsible for it have to be brought to book, hence the prayer made in the present petition has to be adjudicated on its merit by this Court.

19. In view of the judgement of the Apex Court in the case of Rafiq and another (Supra) and the proposition of law laid in the case of Baswaraj and another (Supra) and the gravity of the offence alleged in the F.I.R. of the present case and in the interest of justice, we are of the opinion that the present delay condonation application along with restoration application filed by the applicants-petitioners deserve to be allowed and is, accordingly, allowed.

20. The order dated 30.7.2015 passed by this Court is hereby recalled. Further the restoration application no. 127836 of 2010 along with delay condonation application no. 127833 of 2010 dated 28.4.2010 is restored to its original number and the order dated 29.4.2009 passed by this Court is also hereby recalled.

21. The writ petition is restored to its original number.

(Umesh Chandra Srivastava, J.) (Ramesh Sinha, J.)
Order Dated:- 4.5.2017
Shiraz.