Bombay High Court Shri Victor Albuquerque vs Saraswat Co-Operative Bank Ltd. ... on 7 January, 1998 Equivalent citations: 1998 (3) BomCR 93 Author: R Khandeparkar Bench: R Khandeparkar ORDER R.M.S. Khandeparkar, J. 1. This is an application for condonation of delay of 182 days in filing an appeal against the order dated 15th March 1997 passed by Civil Judge, Senior Division, Panaji in Civil Misc. Application No. 252/96/B in Special Civil Suit No. 132/96/B. It is the case of the applicant that he did not challenge the order dated 15th March 1997, even after obtaining the certified copy thereof on 20th March 1997, till 15th December 1997 for the following reasons namely:– (a) Prior to the passing of the order dated 15th March 1997, the applicant had already filed a comprehensive suit claiming for several reliefs and as such the applicant thought that there was no need of filing an appeal against the said order dated 15th March, 1997. (b) The applicant was holding compromise talks with respondent No. 3 regarding a global settlement between the parties and the same had reached in the final stage and the dispute seemed to be on the verge of amicable settlement and even adjournments were sought on several occasions on that count jointly by the parties. (c) The applicant bona fide thought that the filing of an appeal at that stage may only retard the settlement talks between the applicant and respondent No. 3, and the applicant did not want to precipitate the matter at that juncture, and, (d) It was only on 13th December 1997 on obtaining the advice of the Senior Counsel that the applicant realized that the implications of the findings of the trial Court in the said order would affect the proceedings in Special Civil Suit No. 41/97/B. 2. In the said application it has also been stated by the applicant that the talks between the parties failed sometime towards the end of November 1997 and, accordingly, the applicant decided to pursue the suits filed by him. The application has been supported by the affidavit of the applicant. 3. The application for condonation of delay is being objected to on various grounds by the respondents and in that regard the respondent No. 3 has filed his affidavit-in-reply. In the said affidavit, it is disclosed that on 6th May 1997 the applicant filed an affidavit-in-rejoinder in Civil Miscellaneous Application No. 69/97/B in Special Civil Suit No. 41/97/B wherein the applicant categorically stated that he would refer and rely upon the judgment and order dated 15th March 1997, that is, the impugned judgment for the purpose of determining its true scope and import. It is further disclosed in the said affidavit that the talks for settlement were resumed after 17th June 1997 and the application for adjournment on the ground of talks of settlement was made only after 21st June 1997 and on failure of such talks of settlement, the applicant filed another application, being Civil Miscellaneous Application No. 283/97/B in Special Civil Suit No. 41/97/B on 20th October 1997 seeking to restrain the respondent No. 2 herein from holding its Board Meeting on 22nd October 1997 and considering the appointment of Additional Directors pursuant to the notice dated 17th October 1997. The said affidavit is accompanied by copies of various affidavits and pleadings filed by the applicant in Special Civil Suit No. 41/97/B as well as some correspondence between the parties. 4. The respondent No. 1 has also filed affidavit through its Manager opposing the application for condonation of delay wherein it is disclosed that after the

dismissal of the application for temporary injunction by the impugned order the respondent No. 1 sanctioned loan of the amount of Rs. 115 lakhs to the respondent No. 2 by sanction letter dated 4th August 1997 and disbursement of loan amount was started from 4th November 1997 and till date had already disbursed a sum of Rs. 76.21 lakhs to the respondent No. 2 and since the appeal is sought to be filed mainly to restrain the respondent No. 1 from granting loan to the respondent No. 2 and the loan having already been sanctioned and granted, the appeal itself has become infructuous and, therefore, there is no ground for condonation of delay. 5. The applicant has also filed affidavit-in-rejoinder denying the various statements in the affidavits-in-replies and has stated therein that on compromise talks having been commenced in June, he thought that the filing of the appeal would only hamper and retard the talks. It is also stated therein that since 1994 the talks for compromise were going on and had broken down several times and during this time the applicant had been filing various suits and applications to protect his rights. It is also alleged for the first time in the rejoinder that the talks for settlement had been initiated sometime in early June and the application for adjournment was moved on 19th June 1997. While admitting the fact that on 20th October 1997 the applicant had filed an application, being Civil Miscellaneous Application No. 283/97/B in Special Civil Suit No. 41/97/B, the applicant has sought to justify filing of the said application. 6. Upon hearing the advocates for the parties and on going through the records, it is seen that the impugned order was passed on 15th March 1997, the certified copy thereof was applied for on 17th March 1997 and the date for taking delivery was given as 19th March 1997. However, the same was collected on 20th March 1997. In the normal course, therefore, the last date for filing the appeal was 17th June 1997. It is the case of the applicant as disclosed from the records that a joint application for adjournment of the proceedings in the civil suit on the ground of settlement talks being initiated was filed on 19th June 1997 whereas it is the contention of the respondents that the said application was filed on 21st June 1997. In any case, the said application was filed after the period of limitation prescribed for filing the appeal was over. It is apparent from the record, therefore, that till 17th June 1997 there was no talks for settlement and the same were initiated only thereafter. In other words, till the last date of period of limitation for filing the appeal against the impugned order and there was no occasion for the applicant, either bonafide or otherwise, even to think that filing of appeal would retard the settlement talks. It is thus clear that there is absolutely no link between the settlement talks and the inaction on the part of the applicant in respect of filing of the appeal within the limitation period. As is held in the judgment of the Apex Court relied upon by the applicant himself in the matter of Ramlal and others v. Rewa Coalfields Ltd. in all cases falling under section 5 of the Limitation Act, 1963 what the party has to show is as to why he did not file the appeal even on the last day of the limitation period prescribed. This may inevitably require the party to show sufficient cause for not filing the appeal till the last day of the period of limitation as well as further explanation for the delay caused thereafter. When a party allows the period of limitation to expire without filing the appeal and

desires to claim sufficient cause for not filing the appeal within the prescribed period, the sufficient cause to be shown by the party would not be restricted only to the period beyond the period of limitation but the party has to justify as to why the period of limitation was allowed to be expired without taking proper action for filing of the appeal. Merely justifying the delay beyond the period of limitation prescribed for filing the appeal would not automatically entitle the party to get the delay condoned. In fact the Apex Court in the matter of Ajit Singh Thakur and another v. State of Gujarat has clearly observed thus :– "It is true that a party is entitled to wait until the last day of limitation for filing an appeal, but when it allows limitation to expire and pleads sufficient cause for not filing the appeal earlier the sufficient cause must establish that because of some event or circumstance arising before limitation expired it was not possible to file the appeal within time. No event or circumstance arising after the expiry of limitation can constitute such sufficient cause. There may be events or circumstances subsequent to the expiry of limitation which may further delay the filing of the appeal. But that the limitation has been allowed to expire without the appeal being filed must be traced to a cause arising within the period of limitation.'' As is already seen above, the talks for settlement were initiated after the period of limitation. The whole and the main trust of the argument of the learned Counsel for the applicant to justify the condonation of delay is that the applicant bona fide thought that the settlement talks would result in amicable settlement and that he bona fide thought that filing of the appeal would retard the settlement talks. Since settlement talks had not even commenced before the expiry of the period of limitation and they were initiated only after the expiry of limitation period, the point relating to the settlement talks cannot be in a way considered to be even a cause for non-filing of the appeal before the expiry of the period of limitation. That apart, it is the case of the applicant himself that he had filed comprehensive suit claiming several reliefs and, therefore, he thought that there was no need of filing the appeal. These statements had been verified as true to his knowledge by the applicant in the affidavit in support of his application. At the same time it has been disclosed in his application that the applicant for the first time obtained advice for his advocate regarding the implications of the impugned order only on 13th December 1997. The two statements do not reconcile with each other. It is not disclosed as to whether any legal advice was obtained by the applicant before forming his opinion regarding non-requirement of filing of the appeal against the impugned order. Nevertheless records disclose that the applicant was all along represented by his lawyer in all legal proceedings which were in progress even during the progress of talks of settlement. It is now well established that the test, to decide whether or not a cause is sufficient, is to see whether it could have been avoided by the party by the exercise of due care and diligence. In other words nothing shall be deemed to be done bona fide or in good faith which is not done with due care and diligence. The expression sufficient cause has necessarily to be a cause which is beyond the control of the party seeking condonation of delay. The existence of sufficient cause being a condition precedent for exercise of discretion of condonation of delay by the Court, in the absence of such sufficient

cause being shown, the delay in preferring the appeal cannot be condoned. A bald statement on the part of the applicant that he thought it fit not to file the appeal on account of comprehensive suit already filed by him cannot at all be stated to be a sufficient cause for not preferring the appeal either within the prescribed period or beyond it till he obtained legal advice. Neither the application nor his affidavit discloses that the applicant is equipped with knowledge of law so as to make decision himself as regards non-requirement of filing of the appeal. As long back as in the year 1938 this Court has ruled in the matter of Maria Flaviana Almeida and others v. Ramchandra Santuram Asavle and others, reported in A.I.R. 1938 Bombay 408 that want of care and attention or want of due diligence negatives the existence of sufficient cause. The applicant has not disclosed what care and caution he had taken before deciding himself not to file appeal against the impugned order till the expiry of period of limitation or for that matter till 13th December 1997. The applicant has not disclosed as to what prevented him from seeking necessary legal advice in the matter till 13th December 1997. Certainly, compromise talks could not have come in the way of the applicant in seeking necessary advice from the lawyer. The records therefore show per se negligence on the part of the applicant during the entire period of limitation and in allowing the same to expire without taking any steps to file the appeal, and even thereafter till 13th December 1997. 7. As regards the period of delay from the date of expiry of period of limitation till the date of filing of the appeal, it is seen from the records that the applicant was fully aware at least from 20th October 1997, if not earlier, that the talks for settlement had failed and he had even moved an application, being Civil Miscellaneous Application No. 283/97/B in Special Civil Suit No. 41/97/B on 20th October 1997 seeking the relief in the nature of injunction to restrain the respondent No. 2 from appointing additional directors. In other words, the excuse of settlement talks as well as so called bona fide thinking on the part of the applicant that the filing of the appeal would retard the talks of settlement was no more available to the applicant from 20th October 1997 onwards. In any case, therefore, from 20th October till 13th December the alleged cause was not even in existence under any circumstance. However, there is absolutely no explanation as to why no steps were taken to file the appeal during the said period and as to why he had to wait till 13th December to seek the advice of the Senior Counsel regarding the implication of the findings in the impugned order. 8. As regards the ground of talks of settlement being in progress from the date of expiry of period of limitation till 20th October 1997, it is seen from the records and from his own admission in the affidavit-in-rejoinder that the initiation of compromise talks in June and failure thereof in October was not a new phenomenon for the applicant and applicant by then had been well experienced since 1994 as on several occasions settlement talks were initiated and were broken down. A solemn affirmation in this regard of the applicant himself in his affidavit-in-rejoinder is worth reproducing. It reads as under:– "I say that on the respondent's own showing compromise talks have been going on since 1994. However during this period of four years the talks have broken down several times and I was compelled to file the suits and the Misc. Civil

Applications to protect my rights and interest." In other words, the applicant was fully aware that inspite of compromise talks, he was required in the past to file several suits and applications to protect his rights and interest and there was no failure in taking appropriate steps by the applicant to protect his interest inspite of talks being in progress. In other words, the applicant was not only aware of the legal position that in order to protect his interest he cannot fail in initiating appropriate proceedings in time and secondly that such steps do not result in retarding the settlement talks. It is not the case of the applicant that he was not aware that any period of limitation was prescribed for filing of the appeal. On the contrary he claims that he was confident of non-requirement of filing of the appeal on account of comprehensive suit filed by him. In this set of facts disclosed by the applicant himself it is unbelievable that the applicant could have any reason to believe that filing of the appeal would cause any obstruction in the settlement talks. A person who is fully aware that in order to protect his rights he has to take steps within prescribed time under the law cannot be presumed to believe that taking of such steps would cause any obstruction in the settlement talks. There is absolutely no material placed on record as to what made the applicant to believe that filing of the appeal within prescribed period could cause any obstruction to or 'retard', as stated by the applicant himself, the settlement talks when in the past the applicant himself had taken appropriate steps to file suits and Miscellaneous Applications even when the settlement talks were initiated and broken down on several occasions for last four years. 9. As regards the ground of realizing the implications of the impugned order only after obtaining advice of the Senior Counsel, the ground itself ex facie discloses that the applicant had been grossly and patently negligent and did not act with due care and diligence to obtain proper advise. If a party sleeps over his rights for 180 days beyond the period of limitation and seeks advice thereafter for filing an appeal, that cannot be a sufficient cause for condoning the delay and the judicial pronouncement in this regard by this Court in the matter of Maria Flavians Almeida and others (supra) is clear. 10. Shri S.G. Dessai, the learned Senior Counsel appearing for the applicant, tried to seek assistance from some of the judgments of the Apex Court and the High Courts in support of his submissions. Relying upon the judgment of the Apex Court in the matter of Collector, Land Acquisition, Anantnag and another v. Mist. Katiji and others , he submitted that while considering the application for condonation of delay, the Court should not take a pedantic approach and there is not presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides, and the litigant does not stand to benefit by resorting to delay. There can be no dispute on the proposition canvassed by the learned Counsel. But at the same time one cannot forget that the relief of condonation of delay is a discretionary relief and the discretion has to be exercised judiciously. The discretion for condonation of delay can be exercised on consideration of all the relevant facts including diligence and bona fides of the party praying for condonation of delay. While exercising such discretion, the Court is not supposed to lightheartedly disturb the legal right accrued in favour of the opponent by the applicant's failure to prefer the appeal within the

prescribed period. It is not sufficient for the party claiming indulgence from the Court to prove existence of sufficient cause for delay but also he has to show reasonable diligence in prosecuting the proceedings. In a case where the applicant solemnly affirms that he decided not to file the appeal being convinced that he had filed a comprehensive suit praying for several reliefs, he cannot be heard to say that there is no presumption that delay is occasioned deliberately; so also the applicant cannot claim absence of culpable negligence on his part in not preferring the appeal in time, when he is unable to explain as to what prevented him from seeking necessary legal advice regarding the implication of the findings in the order for 180 days beyond the initial period of 90 days of limitation for filing appeal. The ratio of the judgment of the Apex Court in the matter of Collector, Land Acquisition, Anantnag (supra) has no application to the case in hand considering the facts of the case. Besides, while relying upon the said decision in the matter of Devandas Kishnani and others v. Nanikram Kishnani and others , a learned Single Judge of this Court has observed that it is undoubtedly true that a justice-oriented approach is necessary while deciding the application under section 5 of the Limitation Act, 1963, however, it cannot be said that in every case delay must necessarily be condoned. The case in hand is one of such cases where there is absolutely no justification for condoning the delay. As already observed above, in the present case the applicant has not shown due care and diligence in obtaining the necessary advice regarding the implications of the impugned order till 13th December 1997 even though the impugned order was passed on 15th March 1997 and the so called compromise talks were admittedly initiated after the expiry of the period prescribed for the filing of the appeal against the impugned order and had collapsed by 20th October 1997. In this view of the matter, therefore, the judgment of the Apex Court in the matter of Collector, Land Acquisition, Anantnag cannot be of any assistance to the applicant. 11. The decision in the matter of Kumari Amma Bhanumathy Amma v. Kavukutty Amma Kochu Paravathy Amma and others, reported in A.I.R. 1994 NOC 262 (KER.) did not provide any support to the submission on behalf of the applicant. Rather it was a clear case of negligence of the party and Court therein had refused to condone the delay. 12. The next decision is of the Full Bench of Punjab and Haryana High Court in the matter of Smt. Tara Wanti v. State of Haryana through the Collector, Kurukshetra . This decision rather than providing any assistance to the applicant, it justifies the refusal of condonation of delay. It was held therein that the question of existence of sufficient cause is to be decided on the basis of the facts and circumstances of each particular case. Sufficient cause must be a cause which is beyond the control of the party invoking the aid of the section 5 and the test to be applied would be to see as to whether it was a bona fide cause, inasmuch as nothing could be considered to be bona fide which is not done with due care and attention (underlining supplied). Undisputedly in the case in hand the applicant did not care to seek legal advice till 13th December 1997 and on the contrary has made a solemn statement on oath and verified to be true to his knowledge that the applicant had already filed a comprehensive suit claiming for several reliefs and as such the applicant thought that there was no need of filing an appeal against

the said order dated 15th March 1997. In this set of facts the failure on the part of the applicant to take necessary steps for filing the appeal within the prescribed period of limitation cannot be considered to be with due care and diligence and the same discloses lack of bona fides on the part of the applicant in approaching the Court beyond 182 days after the expiry of period of limitation for filing the appeal against the impugned order. 13. Yet another decision relied upon is in the matter of the State of West Bengal v. The Administrator, Howrah Municipality and others . The decision also justifies the rejection of application for condonation of delay rather than granting the same. The Apex Court therein has clearly held that the words 'sufficient cause' should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. (Underlining supplied). In the case in hand the applicant has clearly disclosed negligence on his part in approaching the Appellate Court beyond the prescribed period. 14. Shri Dessai has also placed reliance on the decision in the matter of Oil and Natural Gas Commission v. Tridib Nath Sanyal and others . This again a case relating to the negligence or mistake on the part of the advocate and the Court had held that a party should not be made to suffer on account of mistaken advice given by his lawyer. In the present case, it is not the case of the applicant that he was given any wrong advice by his lawyer. 15. Lastly Shri Dessai has referred to the Apex Court Judgment in Ramlal and others v. Rewa Coal fields Ltd. . Therein the Apex Court has held, while construing section 5 of the Limitation Act, 1963, it is relevant to bear in mind two important questions. The first important question 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 and this legal right which has accrued to the decree holder by laps of time should not be light heartedly 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. The learned Counsel has, however, not been able to justify as to how the said decision supports the claim of he applicant for condonation of delay of 182 days in the instant case. The decision rather than assisting the case of the applicant supports the case of the defence. Already a valuable right has accrued in favour of the respondents and the same cannot be lightly taken away and no sufficient cause is shown for condonation of delay. 16. As already observed above the applicant has neither shown sufficient cause for not preferring the appeal within the period of limitation prescribed for filing the appeal nor has justified the delay caused thereafter in filing the appeal. Even assuming that there were compromise talks going on from 19ih June 1997 till 20th October 1997, it is disclosed from the records that such compromise talks going on since 1994 and the talks had broken down several times and inspite of that the applicant had been filing suits and preferring miscellaneous applications to protect his rights. The applicant has also stated on oath that he has already filed a comprehensive suit claiming for several reliefs and as such the applicant bona fide thought there was no need of filing an appeal against the impugned order. In this set of facts there is no sufficient cause made out for condoning

the delay of 182 days. 17. In the result, therefore, the application is liable to be rejected and is, accordingly, hereby rejected with costs of Rs. 500/- to be paid by the applicant to each of the respondents. 18. Application rejected.