**IN THE HIGH COURT AT CALCUTTA**
**Civil Appellate Jurisdiction**
**Appellate Side**

**Present:**

**The Hon'ble Justice Jyotirmay Bhattacharya**
**AND**
**The Hon'ble Justice Tapash Mookherjee**

**M.A.T. 1847 of 2013**
**with**
**CAN 12213 of 2013**
**with**
**CAN 12214 of 2013**

**The State of West Bengal & Ors.**
**Versus**
**Sri Kalyan Ganguly & Ors.**

| | | |
|---|---|---|
| For the Appellants | : | Mr. Joytosh Majumder,<br>Mr. Tulshidas Ray. |
| For the Writ Petitioner/ Respondent No.1 | : | Mr. Ekramul Bari,<br>Ms. Tanuja Basak. |
| For the School Authorities | : | Mr. Supratick Shyamal,<br>Mr. Dilip Kumar Shyamal. |
| Judgement On | : | 11th September, 2014. |

**Re : CAN 12213 of 2013 (Section 5)**

**Jyotirmay Bhattacharya, J.** This mandamus appeal is directed against the judgement and/or order dated 27th March, 2012 passed by a Learned Single Judge of this Court in W.P. No. 25019(W) of 2010 at the instance of the State-appellants. Along with the appeal, an application under Section 5 of the Limitation Act has also been filed by the appellants praying for condonation of

186 days delay in filing this appeal. Reason for the delay has been explained by the appellants in the said application very casually.

We will deal with the explanation which was given by the appellants for the delay in preferring this appeal subsequently.

Mr. Majumder, learned Assistant Additional Advocate General, appearing for the State-Appellants tried to impress upon us that this appeal being a meritorious appeal, the Court should not reject the application for condonation of delay by considering the reasonableness of the explanation for such delay very rigidly.

Normally, while considering an application for condonation of delay, we consider the merit of the appeal and in the event we find that the appeal is a meritorious one, we no doubt take a very liberal approach in condoning the delay, provided however, we find some justifiable explanation is forthcoming from the side of the State-appellants.

It is no doubt true that unlike the private litigants, no individual in any Government organisation can take independent decision for filing an appeal, as the concerned file is moved from one table to another before taking the ultimate decision for preferring an appeal before the appellate forum, but, that does not mean that delay of any length of time can be condoned even without any explanation by treating the State Government as a favoured litigant.

Several decisions of the Hon'ble Supreme Court are cited at the Bar in support of the contentions of the learned advocates of the respective parties.

The decisions which are cited by Mr. Majumder uniformly laid down the principle of liberal approach to be taken for condoning the delay in filing the appeal by the State Government.

The decisions which are cited by Mr. Majumder are as follows :-

1) 2012 (1) CLJ 626 - State of West Bengal & Ors. –vs- Biswajit Bhattacharya & Ors.
2) 1998(7) SCC 123 - N. Balakrishnan –vs- Krishnamurthy.
3) 2011(14) SCC 86 - B.T. Purushottama Rai –vs- K.G. Uthaya & Ors.
4) (1996) 3 SCC 132- State of Haryana Vs. Chandra Mani & Ors.

Mr. Majumder has cited another decision of the Hon'ble Supreme Court, in the case of Sainik Security Vs. Sheela Bai & Ors., reported in 2008 (3) SCC 257 wherein 769 days delay was condoned by the Hon'ble Supreme Court subject to payment of cost of Rs. 10,000/- .

On the contrary, the decisions which are cited by Mr. Bari, learned advocate appearing for the writ petitioner/respondent no.1 show that the Hon'ble Supreme Court has uniformly taken a very stringent view by holding that in the absence of reasonable explanation for the delay, delay cannot be condoned even in a case of any appeal filed by the State Government.

The decisions which are cited by Mr. Bari in support of his above contention are mentioned hereunder :-

1) 2013(4) SCC 57 - Union of India & Ors. –vs- Nipen Sharma.
2) 2013(4) SCC 52 - Amalendu Kumar Bera & Ors. –vs- The State of West Bengal
3) 2014(2) SCC 422 - The State of Uttar Prdesh –vs- Amarnath Jadav.

Keeping in mind the principles as laid down by the Hon'ble Supreme Court in all those decisions cited at the Bar, let us now consider as to whether the appeal is at all a meritorious one or not.

Here is the case where we find that the writ petitioner/respondent no.1 was a non-teaching staff in Chetla Sri Aurobindo Vidyapith. He was appointed in the said school in 1983 and his appointment was duly approved by the concerned District Inspector of Schools with effect from 19th August, 1983. In 1999, he submitted an application before the school authority seeking his release from service and he prayed for payment of his retirement benefits before the school authority.

This letter was interpreted by the school authority as his letter of resignation. The school authority accepted the said proposal of the writ petitioner in its Managing Committee's meeting held on 4th December, 1999.

It is contended by the writ petitioner that the said letter was misconstrued by the school authority as a letter of his resignation as he never intended to resign from his service. It is also contended by him that, in fact, he wanted voluntary retirement so that he could have got the retiral dues.

Fact remains that submission of the said letter by the writ petitioner and adoption of a resolution by the school authority in its Managing Committee meeting are apparent on record.

Drawing our attention to those two documents, Mr. Majumder submits that once the resignation was accepted by the school authority, his service was terminated and the relationship of master and servant between the school authority and the petitioner ceased to operate. In support of his submission, he has relied upon a decision of the Hon'ble Supreme Court in the case of Chand Mal Chajal Vs. State of Rajasthan reported in (2006) 10 SCC 258.

Be that as it may, we find that despite such a resolution being adopted by the Managing Committee in the year 1999, the writ petitioner was allowed to continue his service till 31st October, 2003. There is noting on record to show

that the said resolution of the Managing Committee of the school was subsequently ratified in its subsequent meeting. There is nothing on record to show that the decision which was so taken in the said Managing Committee's meeting was communicated to the writ petitioner. Thus, we have no hesitation to hold that the writ petitioner, in fact, was in service in the said school till 31st October, 2003.

It further appears from the records that the writ petitioner subsequently submitted an application to the concerned teacher-in-charge of the said school on 2nd July, 2003 seeking voluntary retirement on his health ground. The school authority accepted the said proposal of the writ petitioner and he was allowed to retire voluntarily with effect from 1st November, 2003.

Problem started after the writ petitioner was allowed to retire voluntarily when the writ petitioner claimed his pensionary benefits and other retiral benefits.

Admittedly, the writ petitioner/respondent no.1 has withdrawn his provident fund contribution in 2004 after he was allowed to go on voluntary retirement. The writ petitioner's claim for other retiral dues and/or his pensionary benefit was ultimately rejected by the Director of School Education on 13th October, 2010 on the ground that since the school authority released the writ petitioner from his duty by treating his application as his resignation letter, he is not entitled to get the pensionary benefit.

The said decision of the Director of School Education was impugned in the writ petition by the said non-teaching staff. Notice relating to the said writ petition was duly served upon the State-respondents. Notice relating to the said writ petition was also served upon the school authority.

At the time when the writ petition was entertained, all the respondents including the present appellants were represented by their learned advocates before the Learned Trial Judge. Direction was given for filing affidavits in the said writ petition. Despite such leave was granted to the State-respondents to file affidavit-in-opposition to the writ petition, the State-respondents did not choose to file any affidavit in the said writ petition.

We are informed that though the school authority affirmed an affidavit in connection with the said writ petition and a copy thereof was served upon the writ petitioner, but ultimately the said affidavit was not filed before the Writ Court. Even on the day when the writ petition was ultimately taken up for hearing before the Learned Trial Judge, neither the State-respondents being the appellants herein nor the school authority appeared before the Learned Trial Judge. As a result, the said writ petition was ultimately decided on merit ex parte against the respondents therein.

On consideration of the representation and/or letter written by the writ petitioner, the Learned Trial Judge construed the writ petitioner's said letter as a letter seeking voluntary retirement. Holding as such the Learned Trial Judge came to the conclusion that the order which was passed by the Director of School Education on 13th October, 2010 rejecting the writ petitioner's claim for grant of pensionary benefit was wrong. Accordingly, the said order of Director of School Education was cancelled and simultaneously direction was given upon the concerned authorities to release the admissible pensionary benefits of the writ petitioner by taking into account the service tenure of the writ petitioner.

Thus, we find that the dispute centers round the construction of the letter which was submitted by the writ petitioner. If it is ultimately found that the letter which was submitted by the writ petitioner is in essence an application for tendering resignation of his service, then he is not entitled to get any pensionary and/or other retiral benefits. On the contrary, if it is found that the petitioner's

said letter is in essence a letter seeking voluntary retirement, then he is entitled to get all retiral benefits including pensionary benefit provided he served in the said institution for a continuous period of 20 years.

We have already indicated above that though the writ petitioner submitted a letter before the school authority seeking his release in the year 1999 and the said letter was considered by the Managing Committee of the said school as a letter of his resignation and the Managing Committee in its meeting held in 1999, accepted the said resignation letter of the writ petitioner, but, in fact, we find that neither the petitioner's said letter was ultimately acted upon nor the resolution which was so adopted by the Managing Committee of the said school ratified in its next meeting nor it was communicated to the writ petitioner.

On the contrary, it is well established that the writ petitioner, in fact, was allowed to continue his service till 31st October, 2003. Admittedly he was paid his salary up to October 2003 and he was allowed to go on voluntary retirement by the Managing Committee of the said school vide its resolution dated 16th December, 2003.

Thus if the entire service period of the writ petitioner starting from the date of his appointment i.e. 19th August, 1983 up to the last working day in the said school i.e. 31st October, 2003 is taken into consideration as his service period, then we find that he was in service in that particular school for a period exceeding 20 years.

To deny the writ petitioner's claim for pensionary benefit, the State authority now has taken a stand that during the service period, the writ petitioner was absent for some time and his prayer for leave during his absent period was not ultimately sanctioned by the West Bengal Board of Secondary Education and if such absent period is deducted from his total service period, then pension is not payable to him for want of his qualifying service for pension.

Though we find from the records that some period of his absence was regularised by grant of leave by the school authority which was also approved by the Board, but some period of his absence was not regularised by the authority concerned.

It is contended by Mr. Majumder that if the period of his absence, which was not ultimately regularised, is deducted from total period of his service, then total period of his service will be less than 20 years and in that event he is not entitled to get the pensionary benefit.

We do not find any substance in such contention of Mr. Majumder as absence of the writ petitioner cannot be construed as temporary cessation and/or discontinuation of his service. It is nobody's case that service of the writ petitioner was terminated and/or he was dismissed from service for his unauthorised absence and he was subsequently re-employed. We hold that in this set of facts, the writ petitioner at best may not get any salary for the period of his absence which was not regularised by grant of leave which was admissible to him under the extant Leave Rules.

As such, we have no hesitation to hold that the writ petitioner was in service in the said school for a continuous period exceeding 20 years and as such after he was allowed to retire voluntarily with effect from 1st November, 2003, the State authorities cannot deny to pay the writ petitioner's claim for his retiral dues.

Thus, we find no merit in this appeal. We cannot accept the contention of Mr. Majumder that since the appeal is a meritorious one, we should take a liberal approach in condoning the delay in filing this appeal.

Though the appellants claim that the delay was 186 days, but, in fact, we find from the Stamp Reporter's report that the delay was of 587 days in filing this appeal. Of course, length of delay is not very much material. What is

material is the reasonableness of the explanation for such delay. Thus even a day's delay may be fatal. On the contrary, delay of several years may be condoned where delay has been reasonably and sufficiently explained.

Let us now consider the reasonableness of the explanation given by the appellants for the delay in filing this appeal before this Court.

The impugned order was passed on 27th March, 2012. Despite notice was served upon the appellants and opportunity was given to the appellants for filing affidavit in the said writ petition, but the appellants did neither file any affidavit in the said writ petition nor chose to appear before the Learned Trial Judge in course of hearing of the writ petition.

The appellants claim that since the impugned order was passed ex parte, the appellants were not aware of the impugned order until it was communicated to the appellants by the learned advocate's letter. Admittedly the concerned District Inspector of Schools received the petitioner's learned advocate's letter communicating the impugned order on 11th May, 2012. Even after such communication, the concerned authority did not take any step in this matter till 15th August, 2012. It is only on 16th August, 2012 instruction was solicited from the Learned Additional Government Pleader as to the next course of action which should be taken in the instant case.

Since the Learned Additional Government Pleader did not give any instruction in this regard, again a reminder was sent to the Learned Additional Government Pleader seeking his advice. In reply to this reminder, the Learned Additional Government Pleader advised the concerned District Inspector of Schools on 2nd January, 2013 to approach the same Court seeking relief. Such advice was presumably given for the reason that the impugned order was passed ex parte against the State authorities.

Even this advice of the Learned Additional Government Pleader which according to us was a fair advice, was not accepted by the concerned District Inspector of Schools who in his turn again approached the Legal Remembrancer for taking steps for filing the appeal.

Though certified copy of the impugned order was applied for by the department of the learned Legal Remembrancer on 7th February, 2013, but the said application was allowed to be lapsed due to not taking steps for obtaining the certified copy of the said impugned order.

Thereafter the Commissioner of School Education was moved by the concerned District Inspector of Schools seeking approval of the proposal for filing the appeal and reminder was also given to the Commissioner of School Education for the said purpose, but ultimately the appeal was filed on 4th December, 2013 after service of the contempt Rule upon the contemnors who are the appellants before us.

Even in the said contempt proceeding, the appellants were represented by their learned advocate and the Court was informed that due to non-cooperation of the school authority, the impugned order could not be carried out.

Be that as it may, we find that the State-respondents have taken a very casual approach in filing this appeal. Though it is true that day to day delay is not required to be explained, but we find that delay for some period which is not negligible has not at all been explained by the appellants. Some period of delay was sought to be explained by contending that the District Inspector of Schools (S.E.) was in childcare leave for some time. This is not an excuse at all for the simple reason that even during her absence, somebody was in charge of the office. Again, the reason why the advice which was given by the Learned Additional Government Pleader has not been acted upon, has also not been disclosed in the application.

This is not a case where we feel that a liberal and lenient approach is required to be taken for condoning the delay in filing this appeal. We feel that this is a fit case where the application for condonation of delay should be rejected with costs as the appellants are pursuing a meritless case creating unnecessary harassment to the writ petitioner.

Accordingly, we reject the appellants' application for condonation of delay with cost of Rs.50,000/- (rupees fifty thousand only) to be paid by the appellants to the writ petitioner/respondent no.1 within two weeks from date.

Consequently, the appeal also stands dismissed.

**Re: CAN 12214 of 2013** (Stay)

In view of dismissal of the appeal in the manner as aforesaid, no further order need be passed on the stay application. The stay application being CAN 12214 of 2013 is thus deemed to be disposed of.

**(Jyotirmay Bhattacharya, J.)**

**(Tapash Mookherjee, J.)**

ac.