

Form No. J(2)

**IN THE HIGH COURT AT CALCUTTA
Appellate/Revisional/Civil Jurisdiction**

Present:

**The Hon'ble Mr. Justice Bhaskar Bhattacharya
And
The Hon'ble Mr. Justice Arun Kumar Bhattacharya**

**R.V.W. No. 4157 of 2005
With
CAN No.9936 of 2005**

Puranmall Goenka

Versus

Mrs Savitri Devi Daga

For the Appellant/Petitioner:

Mr Saktinath Mukherjee,
Mr S. P. Roy Chowdhury,
Mr Saptangshu Basu,
Mr Supratik Shyamal.

For the Respondent/Opposite Party:

Mr Aninda Mitra,
Mr Abhijit Mitra,
Mr Utpal Majumder,
Mr S. Pal,
Mr Sudip Bose.

Heard on: 13.04.2006.

Judgment on: 21/4/2006.

Bhaskar Bhattacharya, J. :

This is an application for condonation of delay of 197 days in preferring an application for review against an order dated 1st April, 2005 passed by a Division Bench of this Court in F.A.T. No.1666 of

2003 by which the said Division Bench allowed a first appeal preferred against a decree passed in a suit for specific performance of contract by setting aside the judgment and decree passed by the learned Trial Judge and instead of that, by directing the defendant to refund the earnest money to the plaintiff with interest.

The review application has been filed not only on the ground of alleged error apparent on the face of record but also on the ground of discovery of new materials.

In the application for condonation of delay, it is alleged that being dissatisfied with the said judgment and decree passed by the Division Bench dated 1st April, 2005, the applicant preferred a special leave application before the Supreme Court of India but the said Court rejected such application for special leave. In the application, it is stated that the petitioner was advised to prefer a special leave application before the Supreme Court and accordingly, such application was filed on 4th May, 2005. The said special leave petition (SLP (Civil) No.12930/2005) was moved before the Hon'ble Supreme Court of India on 18th July, 2005 and on that day, the said application was dismissed. According to the petitioner, thereafter, he approached his learned advocate in New Delhi who advised the petitioner that the next course of action was to prefer a review application before the Supreme Court of India against dismissal of the SLP and consequently, a review petition was drafted and made ready. The said

review application was thereafter filed before the Supreme Court on 16th August, 2005. According to the petitioner, the learned advocate of the Supreme Court further expressed opinion that the petitioner could also file an application for review before this Court and accordingly, sought advice of Mr Somnath Ray, advocate who advised the petitioner that apart from filing a review application before the Supreme Court the petitioner had another remedy before this Court in the form of present review application. Accordingly, the petitioner had a consultation with a senior advocate of this Court regarding filing of the present review application and the said senior advocate opined that the review application should be filed by the petitioner. Thereafter, the petitioner held further conference with another senior advocate and on 28th August, 2005, the latter advised the petitioner to file the present review application.

According to the petitioner, he was also advised to withdraw the review application pending before the Supreme Court of India and on the basis of such advice, he instructed the learned advocate in the Supreme Court to withdraw the pending review application and the same was subsequently withdrawn. Accordingly, the present review application was filed on 7th October, 2005 and in the process there was delay of 197 days.

Mr Mitra, the learned advocate appearing on behalf of the respondent, at the very outset, has taken a preliminary objection

regarding the prayer for condonation of delay even before filing of affidavit. According to Mr Mitra, even if all the averments made in the application for condonation of delay are taken to be true, in view of the decision of the Supreme Court in the case of Abbai Maligai Partnership Firm vs. K. Santhakumaran reported in A.I.R. 1999 S.C. 1486 and also in the case of K. Rajamouli vs. A. V. K. N. Swamy reported in A.I.R. 2001 S.C. 2316, the condonation of delay in preferring this application will be "an abuse of process of Court and also affront to the order passed by the Supreme Court" rejecting the application for special leave.

Mr Saktinath Mukherjee, the learned advocate appearing on behalf of the petitioner, however, has seriously opposed the aforesaid contention of Mr Mitra and according to him, the application filed by his client for special leave having been dismissed summarily, the order passed by the Division Bench dated 1st April, 2005 did not merge with the order of the Supreme Court and in such a situation, his client has every right to avail of the remedy of review provided under Order 47 Rule 1 of the Code of Civil Procedure. Mr Mukherjee contends that the decision of the Supreme Court in the case of Abbai Maligai Partnership Firm (supra), should be ignored by this Court as per incuriam, inasmuch as, in the said decision the Supreme Court did not take into consideration the question of merger and in the subsequent decision of the Supreme Court in the case of Kunhayammed & Ors. Vs. State of Kerala & Anr reported in A.I.R.

2000 S.C. 2587, the earlier decision of the Supreme Court in the case of Abbai Maligai Partnership Firm (supra), has been explained and it has been clearly stated that in the earlier decision mentioned above, the Supreme Court did not take into consideration the question of merger. Mr Mukherjee submits that doctrine of merger being not applicable in case of summarily dismissal of the special leave application, his client has every right to file an application for review notwithstanding the fact that the special leave application had earlier been rejected. He, therefore, prays for overruling the aforesaid preliminary objection taken by Mr Mitra.

After hearing the learned counsel for the parties and after going through the materials on record we find that the Supreme Court in the case of Abbai Maligai Partnership Firm (supra), (a three Judges Bench decision) specifically held that the High Court in that case illegally condoned the delay of 221 days in entertaining a review application after the Supreme Court had dismissed the special leave application against the main judgment. The Supreme Court observed that what was done by the High Court was "subversive of judicial discipline and was an abuse of process of law and should be treated as an affront to the order of Supreme Court".

However, subsequently, another three Judges Bench of Supreme Court in the case of Kunhayammed & Ors (supra), observed that the earlier three Judges Bench in the case of Abbai Maligai

Partnership Firm, totally overlooked the principles of merger and thus, disagreed with the principles laid down therein. Subsequently, another two Judges Bench of the Supreme Court in the case of K. Rajamouli (supra), followed the principle laid down in the case of Kunhayammed (supra) but held that position would be different if after the dismissal of the special leave application against the main judgment, a party files a review petition before the High Court after long delay on the ground that the party was prosecuting the remedy by way of special leave petition and in such a situation, according to the Supreme Court, such conduct of the applicant would be an abuse of process of law thereby following the decision of Abbai Maligai Partnership Firm (supra).

In the case before us, at present we are dealing with an application for condonation of delay and we are not called upon to enter into the maintainability of the review application so long the delay is not condoned. The sole question before us is whether in the facts of the present case the delay should be condoned, even if, all the averments made in the application for condonation of delay are assumed to be true.

We find that in the case of Kunhayammed & Ors (supra), the question was whether the doctrine of merger was applicable if a special leave application is rejected and while considering that question, the said three-Judges-Bench disagreed with the view taken

by earlier three-Judges-Bench in Abbai Maligai Partnership firm without referring the matter to a larger Bench. The latter Bench was of the view that so long the special leave to appeal was not granted, the appeal could not be heard on merit and as such, the doctrine of merger did not apply.

It is true that in the present case, the applicant had twofold remedies; first, he could prefer an application for review under Order 47 Rule 1 of the Code of Civil Procedure and secondly, he could also prefer a special leave application before the Supreme Court. It is needless to mention that scope of an application for review before the selfsame Division Bench is much narrower than that of a special leave application before the Supreme Court. The petitioner in this case in spite of having concurrent remedies decided to abandon the remedy of review and had chosen the remedy of special leave application and in the process, the remedy of review became time-barred. Subsequently, when the special leave application was dismissed, another application for review was filed before the Supreme Court and thereafter, he decided to prefer the present application for review which he earlier had forsaken for the purpose of moving higher forum with wider scope of investigation.

In such a situation, we are of the view that it will be an abuse of process of law and affront to the order of the Supreme Court if we now condone 197 days' delay in preferring the present application for

review when the Supreme Court after hearing the parties has decided not to disturb the original order passed by the Division Bench, of course, by limiting its scrutiny within the scope of Article 136 of the Constitution of India which is wider than the one prescribed under Section 114 of the Code. If a litigant, knowing fully well that within thirty days from the order, he can file an application for review before the same Division Bench whereas within a larger period of ninety days he is entitled to move a special leave application before the Supreme Court, decides to move the higher forum for taking a chance by way of special leave where the scope of argument is much wider and after being unsuccessful before the Apex Court decides to come back for the purpose of availing the road of review, the explanation that in order to approach the Supreme Court for trying his luck he could not come within the period of limitation cannot be held to be sufficient. As pointed out by the Supreme Court in the cases of *Abbai Maligai Partnership Firm* and *K. Rajamouli (supra)*, to condone such a delay will be an abuse of process of Court and an affront to the order of the Supreme Court.

We, therefore, find that in the fact of the present case the ground shown for the delay in filing the application for review should not be treated to be sufficient and we, accordingly, dismiss this application for review. We do not dispute for a moment the submissions of Mr Mukherjee that his client had the legal remedy of review as provided in Order 47 Rule 1 of the Code of Civil Procedure

and such remedy is not forbidden for rejection of an application for special leave against the main order; but if his client prays for condonation of delay in filing such an application for review after unsuccessfully moving the special leave application before the Supreme Court on the ground that he was allegedly bona fide proceeding with that remedy, such explanation should not be treated to be good enough.

We, therefore, dismiss the application for condonation of delay on the ground that it will be an abuse of process of law now to permit the petitioner to avail of the remedy of review after the period of limitation for pursuing such relief has become time-barred by condoning the delay when knowing fully well that he had concurrent remedies, he had in the past allowed one of those to be time-barred and virtually dumped such right.

In view of dismissal of the application for condonation of delay, the review application should be held to be barred by limitation and it is dismissed accordingly.

In the facts and circumstances, there will be, however, no order as to costs.

Sd/- Bhaskar Bhattacharya, J.
(Bhaskar Bhattacharya, J.)

I agree.

Sd/- Arun Kumar Bhattacharya, J.
(Arun Kumar Bhattacharya, J.)