

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.2591 of 2014

ORDER:

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This Civil Revision Petition, under Section 115 of the Code of Civil Procedure, 1908 ('the Code', for brevity), by the unsuccessful defendants 2 and 4 is directed against the orders dated 22.01.2014 of the learned II Additional District Judge, Vijayawada passed in IA.no.1457 of 2012 in OS.no.60 of 1998 filed under Section 5 of the Indian Limitation Act read with Section 151 of the Code requesting to condone the delay of 548 days in filing the application under Order IX Rule 13 of the Code for setting aside the *ex parte* decree dated 30.03.2010 passed in the aforementioned suit.

2. I have heard the submissions of *Sri D. Sudershan Reddy*, the learned senior counsel appearing for the revision petitioners/defendants 2 and 4 ('the defendants 2 and 4', for brevity) and the learned counsel for the respondent/plaintiff ('the plaintiff', for brevity). I have perused the material record.

3. The case of the defendants 2 and 4 as stated in the affidavit of the 4th defendant filed in support of the petition for condonation of delay, in brief, is as follows:

The 2nd defendant is the mother of the 4th defendant. The trial Court proceeded with the trial of the suit and passed an *ex parte* decree on 30.03.2010 as the 4th defendant was not present before the court on the said date. The absence of the 4th defendant before the Court on the said date was neither wilful nor for wanton reasons. The father of the 4th defendant had died. Her mother has no knowledge of the Court matters. The 2nd defendant (Mother of the 4th defendant) has fallen a victim to the unfortunate events that had taken place in the family viz., death of her husband and disputes with her son-in-law, who is no other than the husband of the 4th defendant. The 4th

defendant is involved in certain matrimonial disputes with her husband. She had undergone lot of mental agony in the absence of any amicable solution in sight. Therefore, she could not attend the Court on the date of hearing of the suit. She has filed her documents along with the petition to show her *bona fides*. The defendants 2 and 4 have got strong and good grounds to succeed in the suit. Therefore, the petition is filed to set aside the decree in the suit passed on 30.03.2010. In the circumstances stated, since a delay of 548 days had occasioned in filing the said petition, the present application is filed for condonation of the said delay.

4. The averments in the counter of the sole respondent/plaintiff as could be culled out from the material record, in brief, are as follows:

Originally the suit-OS.no.272 of 1987 was filed on the file of the Court of the learned II Additional Senior Civil Judge, Vijayawada against the sole defendant, that is, the husband of the 2nd defendant and the father of the 4th defendant, the petitioners 1 and 2 respectively herein. The 2nd defendant got herself impleaded in the suit as per the orders dated 04.07.1995 in IA.no.7307 of 1992. Subsequently, the said suit was transferred to the file of the Court of the learned II Additional District Judge, Vijayawada and was renumbered as OS.no.60 of 1998. During the pendency of the suit, the 1st defendant had died. Since his wife is already added as 2nd defendant, his legal representatives were brought on record as defendants 3 and 4. After full fledged trial, the suit was decreed in the year 2004. However, on technical grounds and considering the aspect that the decree passed in the suit is an *ex parte* decree, the decree passed in the suit in the year 2004 was set aside. Thereafter the petitioners herein, that is, the defendants 2 and 4 had engaged a counsel and had filed their written statement. Their said counsel had cross-examined the witnesses examined on the side of the plaintiff. Thereafter the suit was decreed on 30.03.2010. The decree and judgment were passed in the suit on merits after the defendants 2 and 4 had contested the suit. The only course open to the defendants 2 and 4 is to prefer an appeal but, not an application under Section 5 of the Limitation Act

by treating the decree dated 30.03.2010 as an *ex parte* decree. The decree granted is not an *ex parte* decree, but, it is a decree granted on merits. The petition to set aside the *ex parte* decree and the present application for condonation of delay in seeking to set aside the *ex parte* decree are not maintainable. After the decree was granted on 30.03.2010, an Execution Petition in EP.no.25 of 2010 was filed and a sale deed was obtained through process of the Court. Thereafter, an Execution Application was filed in the aforesaid Execution Petition seeking delivery of the property and the property was delivered through process of the Court on 16.09.2011. The petition may be dismissed.

5. At the time of enquiry, no oral and documentary evidence was adduced on either side. On merits, the trial Court had dismissed the petition of the defendants 2 and 4. Therefore, they are before this Court.

6. Now the points for determination is – Whether the revision petitioners/defendants 2 and 4 had made out valid and sufficient grounds and had shown sufficient cause for condonation of delay of 548 days in seeking to set aside the *ex parte* decree and judgment dated 30.03.2010 in OS.no.60 of 1998 on the file of the Court of the learned II Additional District Judge, Vijayawada? And, if so, whether the order impugned in this revision is unsustainable under facts and in law?

7. POINT:

7.1 The cases of the parties and the facts that lead to the filing of this revision petition by the defendants 2 and 4 are already stated supra, in detail.

7.2 The learned senior counsel appearing for the revision petitioners/defendants 2 and 4 while reiterating the case pleaded by them in support of their request for condonation of delay had urged *inter alia* as follows: “The suit is filed originally in the year 1987 against the sole defendant/1st defendant, who is the husband of the 2nd defendant and the father of the 4th defendant. The suit was earlier decreed in the year 2004,

but, the said decree being an *ex parte* decree was set aside. The suit involves a valuable immovable property in which the defendants 2 and 4 are having right, title and interest. The delay of 548 days in the circumstances explained by the 4th defendant in her affidavit cannot be termed as inordinate delay. On the death of the husband of the 2nd defendant and in view of the disputes her son-in-law, that is, the husband of the 4th defendant is having with her, the 2nd defendant has become a victim of unfortunate events. Therefore, she could not attend before the Court. Since the 4th defendant is having matrimonial disputes with her husband and was undergoing lot of mental agony, she could not also attend before the Court on the date of hearing. The said explanation offered by the 4th defendant for non appearance of the defendants 2 and 4 before the trial Court on the date of hearing should have been accepted by the trial Court as sufficient cause for their non appearance. The trial Court ought to have seen that no evidence was adduced on the side of the defendants 2 and 4. The said fact is evident from the judgment passed in the suit. In the circumstances the trial Court ought to have seen that the decree is only an *ex parte* decree and, therefore, the application under Order IX Rule 13 as well as the application for condonation of delay, that is, the instant petition are both maintainable. The trial Court ought to have seen that no evidence was adduced on behalf of these defendants 2 and 4 during the course of trial and, therefore, the findings of the Court below that the remedy open to the defendants 2 and 4 is to prefer an appeal against the decree and that the decree is granted on merits are erroneous and unsustainable. When no evidence at all was adduced on behalf of the defendants 2 and 4 in the suit, the only course available to them is to file a petition seeking to set aside the *ex parte* decree. After the death of the 1st defendant, who is the husband of the 2nd defendant, the 2nd defendant had undergone treatment for vertigo and cardiac problem. The 2nd defendant was also roped into the matrimonial disputes between the 4th defendant and her husband. The 4th defendant is under mental agony on account of the matrimonial disputes she was having by that time with her husband.

Therefore, both the defendants could not prosecute their defence in the suit and consequently, *ex parte* decree was passed. In the circumstances stated, the delay had also occasioned in seeking to set aside the *ex parte* decree. The order of the Court below is contrary to the facts. The Court below did not properly appreciate the contentions of the defendants 2 and 4. The observation in the orders of the Court below that the application filed under Section 5 of the Limitation Act is not maintainable is unsustainable. Since the valuable rights in regard to immovable property are involved in the suit, the Court below ought to have condoned the delay and ought to have permitted the defendants 2 and 4 to prosecute their petition to set aside the *ex parte* decree.” The learned counsel for the defendants 2 and 4 having called in aid the decisions viz. **(i) Guanaganti Bala Krishnamma v. K. Aadi Seshiah [2007 (4) ALT 161]**; and, **(ii) Boda Venkataramanamma v. I. Satyavathamma [2008 (2) ALT 587]** had urged that the delay had to be condoned when satisfactory explanation is offered and that when the petitioners had explained the circumstances in regard to their inability to appear before the Court on the date of hearing the delay deserves to be condoned.

7.3 *Per contra*, the learned counsel for the plaintiff while supporting the orders of the Court below had contended as follows: “The decree is a decree granted on merits as rightly held by the Court below. The only course open to the defendants 2 and 4 is to prefer an appeal. The application under Order IX Rule 13 of the Code for setting aside the *ex parte* decree is not maintainable; therefore, the application filed for condonation of delay is also not maintainable and is liable to be dismissed. The provisions of Order XVII Rule 2 of the Code and the explanation thereof are not applicable to the facts of the case on hand as DWs1 and 2, that is, the 1st defendant and one Amar Mohan were examined as witnesses on the side of the defendants and that after examination of the said witnesses, no further evidence for the defendants was reported. Even otherwise, no explanation much less valid explanation was offered for condonation of the long delay of more than one and a half year. There is not even a whisper as to why the delay had

occasioned in seeking to set aside the decree.”

7.4 I have bestowed my attention to the facts and the submissions. I have given earnest consideration to the submissions.

7.5 The first contention of the defendants 2 and 4 is that at trial of the suit no evidence was adduced on the side of the defendants 2 and 4 and that the said fact is evident from the judgment passed in the suit and that in the light of the said fact the trial Court ought to have seen that the decree is only an *ex parte* decree and, therefore, the application under Order IX Rule 13 as well as the application for condonation of delay, that is, the instant petition are both maintainable. It is also urged on their behalf that admittedly on the date when the evidence of the defendants was closed neither the defendant no.2 nor the defendant no.4 had appeared before the trial Court and that in that view of the matter it cannot be said that the Court had disposed of the suit on merits and that the disposal of the suit by the trial Court on merits without setting the defendants 2 and 4 *ex parte* is erroneous. In view of the said contention it is apt to refer to Order XVII Rule 2 of the Code with the explanation thereof, which read as under:

‘Procedure if parties fail to appear on day fixed: Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or to make such other order as it thinks fit.

***Explanation:* - Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.’**

As rightly pointed by the learned senior counsel appearing for the defendants 2 and 4 where the evidence or a substantial portion of the evidence of any party has not been recorded and when such party fails to appear on any date to which the hearing of the suit is adjourned, the Court shall dispose of the suit *ex parte*. However, where the evidence or a substantial portion of the evidence has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may in its discretion proceed with the case as if such party were present. There is also

no dispute with settled proposition of law in this regard as laid down in the following precedents: (1) **Prakash Chander Manchanda v. Smt. Janki Manchanda**^[1];

(2) **Eswaraiah v. S A Gaffoor**^[2]; and (3) **K. Ramachandra Raju v. Syndicate Bank, Mehidipatnam Branch**^[3]. In **Prakash Chander Manchanda (1 supra)** the facts are as follows: - 'The suit was ultimately

posted to 30.10.1985 for the evidence of the defendant. The order sheet of the Court disclosed that the counsel for the plaintiff was present but no one was present for the defendant. None of the witnesses for the defendant were also present on that day. Therefore, the Court recorded that the evidence of the defendant was closed and had adjourned the matter for hearing arguments. Subsequently also none appeared on behalf of the defendant. A decree was passed on 21.11.1985. The defendant having claimed that the defendant came to know about the decree on 18.01.1986 filed an application under Order IX Rule 13 of the Code for setting aside the *ex parte* decree. The trial Court dismissed the said application holding that the case was disposed of not in accordance with Order 17 Rule 2 but in accordance with Order 17 Rule 3 and, therefore, the application under Order IX Rule 13 of the Code was not maintainable. The application for review was also dismissed by the trial Court. The appeal was dismissed by the High Court of Delhi summarily.' In this background, the Supreme Court held as follows:

It is clear that in cases where a party is absent only course is as mentioned in Order 17(3)(b) to proceed under R.2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under R.2. Similarly the language of R.2 as now stands also clearly lays down that if any one of the parties fail to appear, the Court has to proceed to dispose of the suit in one of the modes directed under O.9. The explanation to R.2 gives a discretion to the Court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined upto that date the Court has no option but to proceed to dispose of the matter in accordance with O.17 R.2 in any one of the modes prescribed under O.9 Civil P.C. It is therefore clear that after this amendment in O.17 Rr.2 and 3 Civil P.C there remains no doubt and therefore there is no possibility of any controversy. In this view of the matter it is clear that when in the present case on 30-10-1985

when the case was called nobody was present for the defendant. It is also clear that till that date the plaintiff's evidence has been recorded but no evidence for defendant was recorded. The defendant was only to begin on this date or an earlier date when the case was adjourned. It is therefore clear that upto the date i.e. 30-10-1985 when the trial court closed the case of defendant there was no evidence on record on behalf of the defendant. In this view of the matter therefore the explanation to O.17 R.2 was not applicable at all. Apparently when the defendant was absent O.17 R.2 only permitted the Court to proceed to dispose of the matter in any one of the modes provided under O.9. It is also clear that O.17 R.3 as it stands was not applicable to the facts of this case as admittedly on the date when the evidence of defendant was closed nobody appeared for the defendant. In this view of the matter it could not be disputed that the Court when proceeded to dispose of the suit on merits had committed an error.

There is no dispute with the settled legal proposition. Hence, there is no need to expand on the said proposition of law any further. However, having regard to the facts of the instant case, it is to be examined as to whether in the instant case the decree in the suit insofar as the defendants 2 to 4 is an *ex parte* decree or a decree on merits. Dealing first with the said question as to whether the decree is an *ex parte* decree insofar as the defendants 2 and 4 are concerned, what is to be first noted is that written statements were filed by the said defendants resisting the suit. Earlier an *ex parte* decree was passed in the year 2004 in the suit of the year 1987 (old 272/87). After the said *ex parte* decree was set aside, the present decree was passed on 30.03.2010. As already noted, the 1st defendant, who is no other than the husband of the 2nd defendant, during his life time, had filed a written statement. The 2nd defendant was impleaded as a party to the suit at her own instance *vide* orders dated 04.07.1995 in IA.no.7307 of 1992. The 4th defendant and the 3rd defendant were impleaded as party defendants to the suit after the death of the 1st defendant, they being his legal heirs. The 2nd defendant had filed her written statement resisting the suit. Thereafter the plaintiff filed a rejoinder. After the earlier *ex parte* decree dated 28.08.2004 was set aside, the 4th defendant had also filed her written statement. Basing on the pleadings, issues and additional issues were framed. On the side of the plaintiff, PWs1 to 3 were examined and exhibits A1 to A26 were marked. On the side of the defendants, DWs1 and 2 were examined and exhibits B1 to

B20 were marked. Neither the 2nd defendant nor the 4th defendant entered the witness box to substantiate their defences in their respective written statements. The orders of the Court below, which are impugned in this revision, would show that the defendants 2 and 4 were granted a number of opportunities and sufficient time to adduce evidence on their side and that on 25.03.2009 the evidence on their side was finally closed on their counsel reporting no further evidence. Even after reopening of the matter after impleadment of the other defendants in the suit, time was granted for adduction of evidence, if any, of both the sides. Further, on the representation of the counsel for the defendants 2 and 4, the evidence on their side was treated as closed. Thus, the evidence on the side of the defendants 2 and 4 was not closed for default on their part to adduce evidence; but, the evidence was closed on their counsel reporting no further evidence, as could be seen from the observations in the order impugned. The certified copy of the proceedings sheet of the trial Court maintained in the suit is not filed by the defendants 2 and 4 to show that the said observations in the order impugned are contrary to the record of the Court. Therefore, this is not a case to which the benefit under explanation appended to Order XVII Rule 2 of the Code is attracted. Thus, in the case on hand, as already noted, the order impugned discloses that the counsel engaged by the defendants 2 and 4 had reported no further evidence and therefore, the evidence on their side was closed but, the evidence on their side was not closed on account of their non appearance on the date to which the hearing of the suit was adjourned. Be it gain said that the evidence on the side of the defendants 2 to 4, as already noted, was not closed either for the absence of their counsel or the defendants 2 and 4, but, their evidence was closed on their counsel reporting no evidence/no further evidence as by then DWs1 and 2, that is, the 1st defendant and another independent witness were examined on the side of the defendants. Hence, the decision and the legal proposition being sought to be relied upon are not helpful to advance the cause of the defendants 2 and 4. Therefore, this Court finds itself in agreement with the finding of the Court below that the decree insofar as the defendants 2 and 4 cannot be termed as an *ex parte* decree.

7.6 Be that as it may, proceeding on the assumption that the decree is an *ex parte* decree, it is now to be examined as to whether valid and sufficient grounds are made out and sufficient cause is shown for condonation of delay. In this regard, it is apt to note the following settled propositions on the settled legal aspects regarding condonation of delay: 'The statutory provision mandates that while considering the applications for condonation of delay, the applicants are required to show sufficient cause for condonation of such delay. Condonation of delay is a matter of discretion of the Court. The words 'sufficient cause' under Section 5 of the Limitation Act should receive liberal construction so as to achieve substantial justice. However while condoning the delay; the Court should not forget the opposite party altogether. A liberal approach is to be adopted in considering the application for condonation of delay on the ground of sufficient cause under Section 5 of the limitation Act. The concept of such a liberal approach cannot be equated with doing injustice to the other party. The court cannot condone the delay in a case where the Court concludes that there is no justification for the delay. The discretion has to be exercised within the reasonable bounds known to the law. Whims or fancies, prejudices or predilections could not form the basis for exercising the discretionary power. When the delay is directly a result of negligence or default or inaction of a party, such delay cannot be condoned on mere asking of that party. When an applicant makes an incorrect statement in an application seeking condonation of delay, the Court ought to refuse to condone such delay or inordinate delay. When the explanation offered is a sufficient cause for condonation of delay, but the delay that deserves to be condoned is a long delay, such delay is generally condoned by imposition of adequate costs as compensation to offset the delay in hearing and disposal of the case. Length of delay is no matter and the acceptability of the explanation is the only criterion. If there is no acceptable explanation, sometimes a delay of shorter length may also be uncondonable whereas in certain other times, the delay of a very long range can be condoned provided sufficient cause is shown." The expression 'sufficient cause' is a cause for which the defendant could not be blamed. [Vide the

decision of the Supreme Court in **Parimal v. Veena**^[4]. In this decision, it was also held as follows: 'However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion it has to be exercised judiciously.'

7.7 A plain reading of the affidavit, the contents of which are already stated supra, would show that there is an explanation in the affidavit only for the non appearance of the defendants 2 and 4 on the date of hearing of the suit. Subsequently, the decree was passed on 30.03.2010. Even the material record would disclose that an Award of dissolution of marriage between the 4th defendant and her husband was granted by the Lok Adalat bench at Vijayawada on 18.02.2009, that is, much before the decree was passed in the suit. There is no explanation at all for the long delay of 548 days from the date of the decree and till the date the application to set aside the *ex parte* decree was filed. The present petition for condonation of delay was filed on 28.09.2011. No explanation, much less valid explanation is forthcoming for the said long delay of 548 days in seeking to set aside the *ex parte* decree. The court cannot condone the delay in a case where the Court concludes that there is no justification for the delay. The discretion has to be exercised within the reasonable bounds known to the law. Having regard to the facts and the sequence of events in the suit of the year 1987, this Court is of the considered view that the delay is directly a result of negligence or default or inaction of the defendants 2 and 4 and that such delay cannot be condoned on mere asking and in the absence of any explanation. Thus, the case of the defendants 2 and 4 has no acceptable merit, judged from any angle.

7.8 Viewed thus, this court finds that the well reasoned order of the court below is sustainable both under facts and in law and that the court below in the facts and circumstances of the case is justified in dismissing the petition filed by the defendants 2 and 4 and in refusing to condone the delay in seeking to set aside the *ex parte* decree. The point is answered accordingly.

8. In the result, the Civil Revision Petition is dismissed confirming the

orders of the court below.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this revision shall stand closed.

JUSTICE M. SEETHARAMA MURTI

01st June, 2016

Vjl

[\[1\]](#) AIR 1987 SC 42

[\[2\]](#) 1998 (4) ALT 234

[\[3\]](#) 1983 (2) APLJ 1 = 1983 (2) An W R 130

[\[4\]](#) AIR 2011 SUPREME COURT 1150