

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.4824 of 2015

And

C.R.P.V.M.P.No.4470 of 2016

ORDER:

This Civil Revision Petition under Section 115 of the Code of Civil Procedure, 1908, is filed by the unsuccessful petitioner/ defendant assailing the orders dated 15.07.2015 of the learned I Additional Senior Civil Judge, Ranga Reddy District, passed in I.A.No.731 of 2013 in O.S.No.1358 of 2012 filed under Section 5 of the Limitation Act requesting to condone delay of 161 days in filing the petition under Order IX Rule 13 of the Code requesting to set aside the *ex parte* decree dated 20.12.2012.

2. I have heard the submissions of *Sri S.R.Sanku*, learned counsel for the revision petitioner and *Sri T.C.D.Sekhar*, learned counsel for the respondent. I have perused the material record.

3. The facts, which are necessary to be stated as a prelude to this order, in brief, are as follows:

The plaintiff/ respondent herein (hereinafter, 'plaintiff') brought the aforesaid summary suit against the defendant/ petitioner herein (hereinafter, 'defendant') for recovery of a sum of Rs.4,00,000/- on the foot of a promissory note dated 16.12.2009. The defendant remained *ex parte* having not entered appearance within the time allowed under law. Subsequently, an *ex parte* decree was passed. Thereafter, the defendant filed an application seeking to set aside the *ex parte* decree. Since a delay of 161 days had occasioned in filing the said petition, the defendant further filed the subject application for condonation of the said delay. The said application was resisted by the plaintiff. The trial Court dismissed the said petition of the defendant. Therefore, the defendant is before this Court.

4. The case of the defendant in support of the request for condonation of delay, in brief, is as follows:

In the suit filed by the plaintiff, he had received the suit summons, but unfortunately, the said summons did not contain the date of hearing on which he was required to appear before the Court. The date of hearing was conspicuously erased by using whitener and the summonses are also silent about the amounts due from him. The Court below passed orders on 15.11.2012 setting him *ex parte* and the suit was decreed *ex parte* on 20.12.2012. He had not received any amounts from the plaintiff. The suit documents are forged and bogus; and are fabricated for the purpose of the suit claim. In fact, the defendant never had an occasion to meet the plaintiff. He received notices in E.P.No.13 of 2013 for his appearance before the executing Court on 26.07.2013. But, to his surprise, his office started deducting his salary and issued to him, a letter dated 13.06.2013. Then only, he came to know about the suit filed against him. Thereafter, he engaged a counsel to take necessary steps immediately. Initially, he received a legal notice from G.Jaya Prakash Babu, Advocate; and on 15.09.2011, he met him and stated to him that he does not even know his client and explained to him about the financial condition; then the said advocate assured that he will inform his client about the same. Again, when the defendant met him after receipt of the suit summons, he told the defendant that he is not looking after the case of the plaintiff and further stated that this defendant need not worry about the summons. On that assurance, this defendant did not initiate any steps. This defendant is an illiterate and does not even know how to write his name. However, this defendant has got fair chances of success in the suit. In the circumstances, the delay in seeking to set aside the *ex parte* decree had occasioned. If the delay is condoned, no prejudice would be caused to the plaintiff and on the other hand, if the delay is not condoned, this defendant would be put to hardship.

5. The case of the plaintiff, in brief, is as follows:

The defendant is guilty of suppression and misrepresentation of the facts of the case. He has not approached the Court with clean hands and as such, the petitioner is not entitled to seek any relief from the Court under any circumstances and more particularly, the relief of stay execution of the decree. In fact, the only intention of the defendant in filing the application is to protract the proceedings and delay realization of the amount due and payable to the plaintiff and thereby trouble the plaintiff to the maximum. The provisions of law under Order XXI Rule 26 of the Code are not applicable to the facts of the present case and the office of the executing Court ought not to have entertained the application and ought to have returned it. Even as per plain reading of the said provision of law, it applies to the Court to which a decree is sent for execution and not to the court which passed the decree. That apart, as per clause 3 of Rule 26 of Order XXI, before making an order of stay, the Court shall direct the petitioner to furnish security or shall impose such conditions as it thinks fit upon judgment debtor. In the instant case, the defendant has not come forward to give security for due performance of the decree. The defendant has not made out any case to seek indulgence of the Court or even to seek mercy also from the Court. Having been served with summons, the defendant failed to contest the suit and allowed the decree to be passed against him. Without showing any sufficient cause for not contesting the suit, the defendant is not entitled to participate in any other proceedings and more particularly, in the present execution proceedings. The contents of the affidavit are quite insufficient for passing the orders sought for in the application. The summons under Order XXXVII Rule 2 were served on the defendant on 12.09.2012, is admitted. After giving sufficient time of nearly two months to the defendant, the trial Court was pleased to set him *ex parte* on 15.11.2012 and posted the matter for consideration on 30.11.2012 and thereafter, the suit came to be decreed with fixed interest. Admittedly, the

plaintiff got issued a legal notice to the defendant and the same was served on him on 13.09.2011; and on 15.09.2011, the defendant issued the reply to the plaintiff's counsel admitting that he has borrowed the amount from the plaintiff and stating as under: "*with reference to the notice dated 06.09.2011, I wish to inform you that due to financial problems, I could not clear the amount and I will pay the amount within November 30th 2011, kindly consider my request*". It is true that the defendant is a Government employee working in NGRI. It is not true to allege that the defendant never received any amount from the plaintiff and that the suit documents are false, forged, bogus and fabricated for the purpose of filing the suit. E.P.No.13 of 2013 is filed for attachment of salary of the defendant; and at the time of issuing the attachment warrant, the executing Court was pleased to issue notice to the defendant. There are no merits in the application and no *bona fides* on the part of the defendant; and the petition deserves to be dismissed. The petition is liable for dismissal.

6. At the time of enquiry before the trial Court no oral and documentary evidence was adduced. On merits, the trial Court dismissed the petition of the defendant. Aggrieved thereof the defendant filed this revision.

7. At the hearing before this Court, the learned counsel for both the sides advanced arguments in line with the pleadings of the respective parties.

8. I have given earnest consideration to the facts and submissions.

9. Before proceeding further, it is profitable to refer to the settled legal principles in regard to the issue concerning 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. Veena¹]. 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.'

¹ AIR 2011 SUPREME COURT 1150

10. In the case on hand, the suit was instituted by the plaintiff invoking summary procedure under Order XXXVII of the Code. Therefore, summons that were sent in the prescribed proforma, viz., Form No.IV in Appendix B appended to the Code, required the defendant to enter appearance within ten days from the date of service of summons. The summons also indicated that in default whereof, the plaintiff will be entitled, after the expiration of the said period of ten days, to obtain a decree for any sum not exceeding the sum specified in the summons and the sum of costs also specified in the summons together with such interest, if any, as the Court may order. However, such summonses do not contain the date of hearing in view of the procedure to be followed and the form prescribed under the Code. However, the defendant having received the summons did not enter appearance within the statutory period of ten days. As per the procedure contemplated under law, the plaintiff shall, together with summons to be served under Rule 2 of Order XXXVII of the Code, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service enter his appearance either in person or by pleader; and, in either case, he shall file in Court an address for service of notices on him; the defendant is also obliged to give notice of such appearance to the plaintiff's pleader on the date of entering appearance. On such entering appearance, the plaintiff is obliged under the procedure contemplated under law to serve on the defendant a summons for judgment in Form No.4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service, supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit. Thereafter, the defendant at any time within ten days from the service of such summons for judgment, by affidavit or otherwise, disclose such facts as may be deemed sufficient to entitle him to defend and apply for leave to defend the suit; and, on such request by the defendant, leave to defend may be granted to him

unconditionally or upon such terms as may appear to the Court or Judge to be just. The proviso to Rule 5 of Order XXXVII of the Code provides that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious. Be that as it may. If the defendant fails to enter appearance and on the failure to follow the procedure laid down and stated supra, it shall be deemed that the allegations in the plaint are admitted and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified, if any, upto the date of decree and also such sum of costs as may be determined by the Court; and such a decree granted accordingly can be executed forthwith.

11. In the case on hand, after the defendant failed to enter appearance, the trial Court decreed the suit of the plaintiff as prayed for. Thereafter, the defendant filed the instant application for condonation of delay of 161 days in seeking to set aside the *ex parte* decree. The case of the defendant in support of the said request is already stated supra, in detail, while extracting his pleaded case. His contention is that he received notice in E.P.No.13 of 2013 requiring him to appear before the executing Court on 26.07.2013 and that his Drawing and Disbursing Officer had started deducting certain amounts from his salary and issued a letter dated 13.06.2013 in that regard. At the hearing it is stated that at that time, he engaged a counsel to take necessary steps and file an affidavit before the trial Court seeking leave to defend the suit and that the said advocate engaged by him promised that he will look after the matter and stated that he need not worry about the summons served in the summary suit. It is also stated that though he received the summons and engaged an advocate, he was not actually aware of the decree in the suit. Pleading so, he seeks condonation of delay that had occasioned in seeking to set aside the

ex parte decree. Certain contentions, which are not pleaded in the affidavit are also urged at the time of hearing.

12. Per contra, the plaintiff while reiterating the case pleaded in his counter which is extracted supra, would contend that the defendant is admittedly served with summons and that he did not enter appearance within the stipulated statutory period of ten days and therefore, the suit was decreed by following the summary procedure contemplated under law and that only after the execution petition is filed and the salary was attached, the defendant came forward with a false plea that the counsel engaged by him having promised to look after the matter failed to properly advise him and that therefore, the *ex parte* decree has come to be passed. The plaintiff also points out in his pleadings that in the reply notice issued to the notice issued prior to the suit, the defendant had admitted that due to financial problems he could not clear the amount and promised to pay the amount within 30th November, 2011 and pleaded to consider his request and hence, the defendant has no semblance of defence, leave alone substantial defence. The plaintiff also submits that all the allegations in the affidavit filed in support of the subject petition are invented and that the present petition is filed only after the salary was attached and that the present attempt is only intended to delay and defeat the just decree debt and claim of the plaintiff. The learned counsel for the plaintiff would further submit that the defendant is by now aged 55 years and that he is on the verge of retirement and that the suit claim is about Rs.6 lakhs with interest and costs as on today and that by attachment of salary only, a sum of Rs.76,000/- was realized so far and that after the period prescribed in the Code, the salary attachment would not be continued and therefore, no further amounts are realizable by the same mode after the prescribed period and that at this belated stage, if the *ex parte* decree is set aside, the plaintiff would suffer serious loss.

13. The defendant admittedly received the suit summons; though he alleges that he engaged an advocate, he did not admittedly enter appearance in the suit within the time allowed under law and remained *ex parte*. Later the *ex parte* decree came to be passed. According to the defendant, the suit summons does not contain the next date of hearing on which he should appear before the Court and that the date of hearing was erased by using whitener and that the summons also does not speak about the amounts due from him and that the Court was pleased to set him *ex parte* on 15.11.2012 and an *ex parte* decree came to be passed on 20.12.2012 and that he received notices in EP No.13 of 2013 for his appearance on 26.07.2013, but, to his surprise, his office started deducting his salary and issued letter dated 13.06.2013 and that then only he came to know about the filing of the suit. He does not say as to what circumstances prevented him from entering appearance and seeking leave to defend the suit. He did not even mention the details like the name of the advocate engaged by him and the date of engagement of the said advocate etcetera. He did not even state as to when he came to know about the *ex parte* decree and did not also explain the long delay from the date of such knowledge till the application is filed before the trial Court. As rightly contended by the plaintiff, if the plaintiff having allegedly made a promise failed to keep up her promise and obtained an *ex parte* decree as alleged by the defendant, nothing prevented him from either preferring an appeal or filing an application for setting aside the *ex parte* decree within a reasonable time. However, he did not do so. The defendant ought to have realized at least after the suit was decreed or after some reasonable time thereafter that his alleged efforts for compromise are not going fructify. But, the defendant deliberately and wantonly did not either prefer an appeal or promptly file an application to set aside the *ex parte* decree. A plain consideration of the pleadings of the defendant would show that he did not state any relevant and material details constituting the 'sufficient cause'. Be that as it may. If the defendant fails to

enter appearance as per the summary procedure referred to supra, it shall be deemed that the allegations in the plaint are admitted and as a sequel the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified, if any, up to date of decree and such sum of costs as may be determined by the Court and such decree can be executed forthwith. The plaintiff also rightly points out in his pleadings that in the reply notice issued to the notice issued prior to the suit, the defendant had admitted that due to financial problems he could not clear the amount and promised to pay the amount within November 30th 2011 and pleaded to consider his request and hence, the defendant has no semblance of defence, leave alone substantial defence. As rightly contended by the plaintiff it appears that the defendant consciously failed to take steps to prefer an appeal or the application to set aside the *ex parte* decree within the time allowed under law and came to Court only after his salary was got attached in the execution proceedings. As per settled law, 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 a bald statement in an application seeking condonation of delay and fails to substantiate the same, the Court ought to refuse to condone such delay or inordinate delay. Further, it is trite to also note that a reading of the affidavit filed in support of the petition would lay bare that the petition is filed in a casual manner without giving any explanation, much less a valid explanation, and without showing sufficient cause for condonation of the long delay. Having received the suit summons and having had knowledge of the suit, the defendant had failed deliberately to attend before the trial Court within the time allowed under law or on other subsequent dates to which the matter was adjourned and had thus allowed the suit to be decreed *ex parte*. In the affidavit filed in support of the petition, necessary ingredients are noticeably absent and the affidavit filed in support of the petition lacks in material

details, which are vital for consideration; and there is no explanation at all for the long delay from the date of the decree and till the date the application to set aside the *ex parte* decree was filed. In the facts and circumstances of the case, the delay cannot be condoned when the defendant who is seeking condonation of delay had failed to demonstrate that the cause that had prevented him from pursuing the remedy had sprouted before the expiry of limitation and continued and prevented him from taking necessary steps till the date the application is filed.

14. In the decision in *Esha Bhattacharjee V/s Managing Director of Raghunathpur Nafar Academy and others*², the Supreme Court having referred to the earlier decisions and discussed the principles related to the issue pertaining to the condonation of delay culled out the broad principles and gave further following guidelines:

- (a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a *lis* on merits is seminal to justice dispensation system.
- (b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.
- (c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.
- (d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters.

In the cited decision, it was further held that neither leisure nor pleasure has any room while one moves an application seeking condonation of delay of almost seven years on the ground of lack of knowledge or failure of justice. It was also held that Court must keep itself alive to the concept of exercise of judicial discretion that is governed by of rules of reason and justice. In *Brijesh*

² 2014 (1) ALD 21 (SC)

*Kumar and others V/s State of Haryana and others*³ the Supreme Court held thus:

“The courts should not adopt an injustice-oriented approach in rejecting the application for condonation of delay. However the court while allowing such application has to draw a distinction between delay and inordinate delay for want of bona fides of an inaction or negligence would deprive a party of the protection of Section 5 of the Limitation Act, 1963. Sufficient cause is a condition precedent for exercise of discretion by the Court for condoning the delay. This Court has time and again held that when mandatory provision is not complied with and that delay is not properly, satisfactorily and convincingly explained, the court cannot condone the delay on sympathetic grounds alone.”

“It is also a well settled principle of law that if some person has taken a relief approaching the Court just or immediately after the cause of action had arisen, other persons cannot take benefit thereof approaching the court at a belated stage for the reason that they cannot be permitted to take the impetus of the order passed at the behest of some diligent person.”

The ratios in the cited cases squarely apply to the facts of the instant case. On the above analysis of the case facts this Court finds that no cause much less sufficient cause was shown for condonation of the delay of 161 days and that the said delay cannot be condoned as there is no justification for the delay and that in the facts and circumstances of the case, the Court below is justified in dismissing the application filed by the defendant for condonation of delay and that there is no merit in the revision.

15. In the result, the civil revision petition is dismissed.

As a sequel, CRP VMP 4470 of 2016 is allowed vacating the interim order dated 04.12.2015 passed in CRPMP No.6347 of 2015.

Pending miscellaneous petitions, if any, in this revision shall stand dismissed. There shall be no order as to costs.

07th December, 2016
RAR

M. SEETHARAMA MURTI, J

³ 2014 (4) ALD 1 (SC)

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI



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