

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.1119 of 2015

ORDER:

This Civil Revision Petition, under Article 227 of the Constitution of India, by the unsuccessful respondents/ plaintiffs is directed against the orders dated 10.12.2014 of the learned Principal Junior Civil Judge, Anakapalle, Visakhapatnam District, passed in I.A.No.106 of 2013 in O.S.No.699 of 2003 filed by the defendants under Section 5 of the Limitation Act, 1963, requesting to condone delay of (2974) days in filing an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 ('the Code') requesting to set aside the *ex parte* decree passed on 01.07.2004 in the afore-stated suit.

2. I have heard the submissions of *Sri M. Radha Krishna*, learned counsel for the revision petitioners/ plaintiffs (hereinafter, 'plaintiffs') and the learned Government Pleader for Arbitration (Andhra Pradesh) representing the State/ defendants. I have perused the material record.

3. What is to be noted is that the plaintiff filed the suit for perpetual injunction in respect of Ac.12.4 cents in Sy.Nos.215/ 1 to 215/ 8 situated in Narapadu village, Sabbavaram Mandal of Visakhapatnam District, more fully described in the schedule annexed to the plaint. The 1st defendant is the State and the 2nd defendant is the Divisional Forest Officer (DFO), Visakhapatnam. The defendants entered appearance through the Assistant Government Pleader, Anakapalle. However, for non-filing of the written statement, the defendants were *ex parte*. Thereafter, the suit of the plaintiffs was decreed *ex parte* on 01.07.2004. The defendants therefore filed the application [un-numbered] for setting aside the *ex parte* decree. As a delay of (2974) days had occasioned in filing the petition seeking to set aside the *ex parte* decree, the subject application is filed for condonation of the said delay. The said application was resisted by the plaintiffs. By the order impugned in this revision, the trial

Court allowed the said petition. Aggrieved thereof, the plaintiffs filed this revision.

4. This Court, by orders dated 26.09.2016 directed the trial Court not to pass any orders in the pending interlocutory application filed under Order IX Rule 13 of the Code in view of the pendency of the revision.

5. The case of the defendants in support of the request for condonation of the delay in seeking to set aside the *ex parte* decree, as stated in the affidavit of the DFO, is as follows:

A.K.Sinha, the then DFO, Visakhapatnam, received summons in the suit and entered appearance through the Assistant Government Pleader (AGP), Anakapalle. The suit was posted for filing written statement and counter in an interlocutory application. The staff in this range of the Department who are concerned with this case were shifted to some other range due to administrative reasons. Hence, the staff concerned could not furnish relevant information to the AGP. As such, the written statement could not be filed. Therefore, the defendants were set *ex parte* and the suit was decreed *ex parte* on 01.07.2004. The plaint schedule property is a reserve forest and belongs to the Forest Department. One of the predecessor DFOs of the deponent was transferred from the Division concerned on 22.01.2005. Subsequently, one Patnakar Juahari was posted as DFO, Visakhapatnam. He worked in that capacity till December, 2005. Thereafter, one K.Eswar Chand, held Full Additional Charge of the said post from 01.01.2006 to 27.03.2006. Subsequently, P.J.Vijaykar was appointed as DFO, Visakhapatnam, on 28.03.2006. Having come to know of the suit proceedings and the events, he got filed an application to set aside the *ex parte* decree along with an application under Section 5 of the Limitation Act, 1963, for condonation of the delay in seeking to set aside the *ex parte* decree. The said applications were assigned GR Nos.970 & 971 on 25.02.2009. Thereafter, many changes were

effected in the Department and one after the other number of officers were posted as DFOs of Visakhapatnam Division and were transferred. The above two petitions, viz., G.R.Nos.970 and 971 of 2009 were not traced in the Court record, though the defendants were prepared to proceed with the prosecution of the said unnumbered petitions. Hence, the subject petition is again filed for condonation of delay of 3002 days in seeking to set aside the *ex parte* decree. The present petition is filed with liberty to not press the petition in case the earlier untraced petitions are traced. Unless the delay in seeking to set aside the *ex parte* decree is condoned and the application filed for setting side the *ex parte* decree is considered and allowed, precious forest land in an extent of Ac.8.00 cents will be lost forever and there will be great ecological repression due to this loss. To show *bona fides*, the written statement is also filed along with the petition to set aside the *ex parte* decree. There are no wilful laches on the part of the Forest Department and its officers and the non-filing of the written statement is not due to wilful and wanton reasons. The delay is also neither due to wilful nor wanton reasons. A detailed report has been submitted to the Conservator of Forests, Visakhapatnam, for initiating suitable action against the employees of the Department for their failure to act in a suitable manner in safeguarding the interests of the Government. The plaintiffs filed an application against the Forest Department and its officers for violation of the decree for injunction. Hence, the delay in seeking to set aside the *ex parte* decree may be condoned.

6. The relevant contentions of the plaintiffs, in brief, are as follows:

The material allegations in the affidavit of the DFO filed in support of the petition are all false. The said averments are denied. As per the provisions of the Article 123 of the Limitation Act, 1963, an application to set aside the *ex parte* decree is required to be filed within (30) days. The defendants are having full knowledge of the institution of the suit as they have entered appearance and sought time for filing written statement. Later, they did not

file written statement and had wantonly remained *ex parte* and allowed the suit to be decreed *ex parte* on 01.7.2004. Ten years after the decree, the petitions are filed for condonation of delay and to set aside the *ex parte* decree. The said conduct of the 2nd defendant is highly illegal, unjust and improper and is intended to harass the plaintiffs belonging to downtrodden section of the society. The allegations mentioned in the affidavit explaining the reasons for non-filing of the written statement and non-filing of the application within the time allowed under law are all false, created and also untenable. Though one DFO was transferred on 22.01.2005, he held the post of DFO, Visakhapatnam, for more than six months. The allegation about shifting of staff and posting and transfers of officers are false and they have nothing to do with the suit proceedings. It is false to say that on 25.02.2009, two applications in G.R.Nos.970 and 971 were filed by the defendants to condone the delay in seeking to set aside the *ex parte* decree and to set aside the *ex parte* decree. Therefore, the further allegations that the said applications allegedly filed were not traced in the record of the Court are also false and untenable. The allegation that the suit land is a forest land and that if the *ex parte* decree is not set aside by condoning the delay, valuable forest land will be lost forever and that there would be ecological repression are all false and invented. The allegation that the 2nd defendant submitted report to the Conservator of Forests, Visakhapatnam, for initiating suitable action against the employees of the Department for their failure to act in a suitable manner in safeguarding the interests of the Government, is also false. After the *ex parte* decree was granted, the plaintiffs filed E.P.No.150 of 2005 long back, that is, in the year 2005 complaining violation of the injunction orders and requesting to punish the defendant/Judgment debtor as the JDr and others committed gross violation of the decree for perpetual injunction. The petition for condonation of delay filed belatedly to protract the litigation is not

maintainable and the said petition is not a *bona fide* petition. The petition is liable to be dismissed.

7. At the time of enquiry before the trial Court, no oral and documentary evidence was adduced. As already noted, the trial Court allowed the petition of the defendants and condoned the delay. Therefore, the plaintiffs are before this Court.

8. It is well settled principle that expression 'sufficient cause' under Section 5 of the Limitation Act, 1963, should receive a liberal construction so as to advance substantial justice and what constitutes sufficient cause always depends on the facts and circumstances of a particular case. Hence, the application need not be rejected merely on the ground of inordinate delay, but the test shall be whether sufficient cause is made out for the delay.

8.1 Before proceeding further, 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. 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.'

8.2 I have given earnest consideration to the facts and the submissions and also the legal position obtaining.

8.3 Reverting to the facts of the case it is apposite to note certain events and dates. The defendants who entered appearance in the suit had remained *ex parte* without filing their written statement. The suit was decreed *ex parte* on 01.07.2004. Therefore, the defendants are having knowledge of the suit and the *ex parte* decree cannot be disputed. The defendants having allowed the suit to be decreed *ex parte* kept quiet and slept over the matter for good.

¹ AIR 2011 SUPREME COURT 1150

The DHrs/ plaintiffs filed E.P.No.150 of 2005 on 27.07.2005 under Rule 32 of Order 21 of the Code complaining violation of the decree for perpetual injunction and requesting to punish the Judgment debtor. The DFO/ JDr having received notice in the EP entered appearance and filed counter on 19.07.2006. Evidence of DHr and that of respondents/ JDrs was also adduced. Thus, even after the notices in the EP were received in the year 2005 no steps promptly were taken to file applications seeking to condone the delay and to set aside the *ex parte* decree. The subject application was filed for condonation of delay on 24.09.2012, i.e., more than (7) seven years after receiving notices in the EP and more than (8) eight years after the *ex parte* decree was passed. No explanation is forthcoming for not waking up from the slumber and in not filing the applications immediately after receiving the notices in the EP. There is absolutely no explanation for the said deliberate inaction, wanton default and obvious negligence. Though it is stated by the defendants that for the same reliefs two applications vide G.R.Nos.970 and 971 of 2009 were earlier filed and the said applications were not traced in the Court record, although the defendants were prepared to proceed with the prosecution of the said unnumbered petitions and the said aspect was adverted to in the orders of the Court below, the said averment regarding filing of the said earlier petitions was not substantiated by producing the office copies of the said petitions, if any, or by producing certified copy of the SP/ GR register of the Court below to show that two such applications which were filed were entered in the GR (General register) and were assigned the said GR nos. The plaintiffs disputed the filing of any such applications by the defendants; and the fact that the plaintiffs' applications for grant of certified copies of the said register were not complied with by the Court below raises a genuine doubt as to whether any such applications were ever filed by the defendants. Even if such applications were filed and not traced in the Court records, nothing prevented the defendants from making a request to the Court to permit to reconstruct the lost record by

receiving the fresh signed copies of the applications. No such course was adopted and the remedy available was not pursued yet again for reasons unexplained. From the alleged GR nos. and pleadings of the defendants it is clear that even the said earlier applications were filed on 25.02.2009, that is, about four and half years after the *ex parte* decree and three and half years after the notices in the EP was served. Even this long delay remains unexplained. The only explanation offered is the inability to give instructions to file written statement due to transfers of staff concerned from the division and successive transfers of the DFOs and their inaction in the matter. Though it is blithely stated obviously for the sake of the present application that the Conservator of Forests, Visakhapatnam, was addressed for initiating suitable action against the employees of the Department for their failure to act in a suitable manner in safeguarding the interests of the Government, no such proof is produced and it is not even stated as to whether or not any departmental action was initiated against even one officer or staff member of the department. After the *ex parte* decree was passed on 01.07.2004 no prompt action was taken to have the same set aside. Even when a EP was filed in the year 2005 complaining violation of the Decree for perpetual injunction and even after notices in the said EP were received, no action was taken for moving the applications for setting aside the *ex parte* decree and condonation of delay. Nevertheless, the EP was contested by filing a counter on 19.07.2006 and the AGP cross examined the DHr and the JDr examined six witness in the EP. When the EP was coming for adducing further evidence, the JDrs/ defendants woke up from their deep slumber and filed applications in a casual manner. Thus not only lack of diligence but also wanton negligence is lit large in the matter. In the light of the facts and events stated supra coupled with the long and abnormal delay it must be held that the casual explanation offered, which is not substantiated, cannot be considered as sufficient cause for condonation of the abnormal delay, which is directly a result of negligence

or default or inaction of the defendants. Such delay cannot be condoned on mere asking of the defendants. When an applicant makes a bald statement in an application seeking condonation of long delay and fails to substantiate the same, the Court ought to refuse to condone such inordinate delay.

8.4 In *Esha Bhattacharjee V/s Managing Director of Raghunathpur Nafar Academy and others*², the facts and findings of the Division Bench of the High Court are as follows: 'The Respondents therein who sought condonation of delay urged that they were not aware of the order passed in the writ petition by the learned single Judge till they received the notice of the contempt application and that thereafter because of miscommunication between the counsel and the parties no steps could be taken and, eventually, an application for vacation of stay was filed and thereafter, the appeal was preferred. That apart, it has been urged that if delay is not condoned there will be great miscarriage of public justice resulting in public mischief and cause of justice would be defeated if the meritorious matter like the present one is thrown out at the threshold. The Division Bench of the High Court took note of the averments made in paragraph 14 of the application of the respondents and thereafter noted the submission of learned Counsel for the parties and then referred to the decision in *Oriental Aroma Chemical Industries Limited V/s Gujarat Industrial Development Corporation and another* [(2010) 5 SCC 459] and held as follows: 'Now upon a close look at the prayer made for condonation of delay we find that although the delay is substantial, the same has been sought to be explained in a manner even if it may not be full proof but is quite convincing.' In that setting of facts and findings, the Supreme Court having referred to catena of decisions and discussed the principles related to the issue pertaining to the condonation of delay, culled out the broad principles and gave further, the following guidelines:

² 2014 (1) ALD 21 (SC)

(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 also 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 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.

8.5 On the above analysis of the facts and law, this Court finds that no cause much less sufficient cause was shown for condonation of the long delay of 2974 days and that the Court below is not justified, in the facts and circumstances of

³ 2014 (4) ALD 1 (SC)

the case, in allowing the application filed by the defendants for condonation of delay and that therefore the order impugned brooks interference.

9. In the result, the revision petition is allowed and the impugned orders dated 10.12.2014 of the Principal Junior Civil Judge, Anakapalle, Visakhapatnam District, passed in I.A.No.106 of 2013 in O.S.No.699 of 2003 are hereby set aside and the said application is dismissed.

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

M. SEETHARAMA MURTI, J

26th October, 2016
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