

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.3125 of 2015

ORDER:

The unsuccessful defendant filed this Civil Revision petition, under Section 115 of the Code of Civil Procedure, 1908, ('the Code', for brevity) having been aggrieved of the order, dated 20.04.2015, of the learned Additional Senior Civil Judge, Tirupati of Chittoor District, passed in IA.no.1115 of 2013 in OS.no.376 of 2008 filed under Section 5 of the Limitation Act, 1963, ('the Act', for short), requesting to condone the delay of (1704) days in filing the application to set aside the *ex parte* decree passed, on 31.03.2009, in the aforementioned suit.

2. I have heard the submissions of Sri G. Pedda Babu, learned counsel for the revision petitioner-defendant, and of Sri V.B. Subrahmanyam, learned counsel for the respondents-plaintiffs. I have perused the material record.

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

The plaintiffs filed the suit for declaration of their ownership in respect of the plaint schedule property and recovery of possession of the same from the defendant and for costs. The defendant purchased the plaint schedule property from its lawful owners in the year 2001 for valuable consideration. Since then the defendant is in possession and enjoyment of the plaint schedule property and enjoying the same by constructing an Asbestos sheet house. She later constructed a RCC building in the year 2006 and is paying house tax to the municipal corporation and the house is being assessed in her name. Even prior thereto, there was electricity connection to the defendant's house. While so, in the month of October, 2007, the 1st plaintiff came to the said house of the defendant and tried to dispossess her and her family members. Then the defendant filed OS.no.1148 of 2007 on the file of the Court of the learned

Principal Junior Civil Judge, Tirupati, against the 1st plaintiff. Later the plaintiffs filed the instant suit for declaration of title and recovery of possession. Having received the summons in the instant suit, the defendant gave the summons to her counsel, G. Chandrasekhar, and instructed him to enter appearance and contest the suit. Due to ill-health her counsel could not represent the defendant in the instant suit and the other suit filed by the defendant. While so an *ex parte* decree came to be passed by the Court on 31.03.2009 in the instant suit and the suit filed by the defendant was dismissed on 15.06.2010 for non prosecution. Later, the defendant also came to know that her said counsel, Chandrasekhar, died. In the circumstances, the defendant could not collect the record from the former counsel. Though the *ex parte* decree was granted on 31.03.2009 directing the defendant to delivery the possession within thirty days from that date, the Execution Petition for recovery of possession was filed after about 1280 days from the date of the said decree. She has got strong defence in the suit and she is in a position to prove her defence on merits provided she is given an opportunity to contest the suit on merits by condoning the delay in seeking to set aside the *ex parte* decree and by setting aside the *ex parte* decree. The delay had occasioned for the reasons stated supra. There is neither wilful nor wanton negligence on the part of the defendant. Hence, the petition is filed for condonation of delay.

4. The 1st plaintiff filed a detailed counter denying each and every allegation made by the defendant in the affidavit filed in support of the petition and further contended in the counter as follows:

The defendant filed the suit for injunction in OS.no.1148 of 2007 on the file of the Court of the learned Principal Junior Civil Judge, Tirupati, on 31.10.2007. In the said suit, she filed an application for appointment of an Advocate Commissioner to note down the physical features. She pleaded in the said suit that she constructed a RCC building; but, it was noticed that there is only an Asbestos room with temporary walls in the plaint schedule land and

that the measurements of the property mentioned by the defendant in her suit did not tally with the measurements of the property in her sale deed. Though the Commissioner was appointed, the defendant did not co-operate with the Commissioner for execution of the warrant in the said suit. On receipt of the summons and the pleadings in the suit filed by the defendant, the plaintiff filed the instant suit on 12.06.2008 for declaration of title and recovery of possession. As the defendant having entered appearance failed to file her written statement, she was set *ex parte*. Subsequently, the defendant filed IA.no.56 of 2009 requesting to set aside the *ex parte* order passed on 19.12.2008 and the same was allowed on condition of payment of costs of Rs.100/-; but, the defendant did not pay the costs and failed to comply with the conditional order; and, hence, the said petition was dismissed on 19.02.2009. Later the plaintiffs' instant suit was decreed on 31.03.2009. The counsel by name Mallikharjuna Rao engaged by the defendant to represent her in the plaintiffs' instant suit is very much alive. The said Chandrasekhar, advocate, has no concern with the present suit. The defendant misled the Court. On this ground alone, the petition is liable to be dismissed. The EP for recovery of possession was filed on 05.10.2012 and was numbered on 12.12.2012; and, Rule 22 notice was ordered to the defendant. The defendant entered appearance in the EP and vakalat was filed on her behalf on 01.03.2013 by G.Chandrasekhar, advocate. The EP was posted to 28.03.2013 for filing her counter. She filed her counter on 10.04.2013. The executing Court having over ruled the objections in the counter ordered Rule 35 notice on 03.06.2013. On service of such notice, the defendant again engaged the very same counsel. Thus, she has got knowledge about the suit as well as the execution proceedings. She filed the present application for condonation of delay and the other application for setting aside the *ex parte* decree by misrepresenting all the facts with a *mala fide* intention. Rule 22 notice was received in the EP on 11.02.2013 and the application for condonation of delay

and the other application for setting aside the *ex parte* decree were filed in the 1st week of December, 2013. Thus, the facts disclose that the defendant was negligent. The delay has not been explained. Hence, the petition may be dismissed.

5. At the hearing before the trial Court, no oral and documentary evidence was adduced. On merits and by the order impugned in this revision, the trial Court dismissed the petition. Hence, the defendant preferred this revision.

6. The learned counsel for the defendant while reiterating the pleaded case of the defendant, which is stated *supra*, in detail, had *inter alia* contended as follows:

The defendant is a rustic and illiterate scheduled tribe woman. She is not well versed with the Court matters and procedure. Hence, the trial Court ought to have taken a liberal view and ought to have condoned the delay that had occasioned in seeking to set aside the *ex parte* decree. Further, the trial Court ought to have seen that the defendant's counsel, Chandrasekhar, has suffered ill-health and later died and that therefore the costs of Rs.100/- imposed, while allowing the application filed for setting aside the *ex parte* order in the suit, could not be paid and that therefore the said petition was ultimately dismissed for non compliance of the conditional order of the court. The delay had occasioned only due to the death of Chandrasekhar, the counsel engaged by the defendant, and lack of knowledge on the part of the defendant about the death of the said counsel and the Court procedures. The court below ought to have seen that the defendant came to know about the *ex parte* decree only on receipt of the notice in the execution petition on 01.03.2013 and that some time was lost in obtaining the record from the office of the deceased counsel. The Court below ought to have accepted the explanation for the delay and that the delay has occasioned not for any wilful and wanton reasons; and ought to have condoned the delay as valuable rights in valuable

immovable property are involved and the defendant has got strong defence in the suit.

6.1. Learned counsel for the defendant relied upon the following decisions:

J. Kumaradasan Nair and another v. IRIC Sohan and others¹ is relied upon in support of the proposition that while considering the request for condonation of delay, the Courts shall not adopt a pedantic approach and that the said provision is meant for grant of relief where a person has committed some mistake and that the provision of the said Section shall be applied in a broad based manner and the Court should examine the question whether the interests of justice demand that the request of the defendant should be refused or not.

The decision in M.K. Prasad v. P. Arumugam² is relied upon in support of the following propositions: 'While deciding applications under Section 5 of the Limitation Act, the Court should keep in mind the extent of property involved in the suit and the stakes of the parties. The delay has to be condoned when the *ex parte* decree has come to be passed and when the delay in seeking to set aside *ex parte* decree had occurred on account of the fault of the counsel but not of the party. If the opposite party can be compensated by awarding exemplary costs, necessary costs shall be imposed and the delay ought to be condoned in the interests of justice to facilitate setting aside the *ex parte* decree.

Mandal Revenue Officer, Yellandu, Khammam District v. Shaik Valia Bee and another³ is relied upon in support of the contentions that the length of delay is not the criterion but the Court has to examine as to whether sufficient cause has been shown or not for condonation of delay and that a suit of the plaintiff cannot be decreed merely because there is no opposition by the defendant and that even while passing an *ex parte* decree also the Court has to

¹ AIR 2009 Supreme Court 1333

² AIR 2001 SC 2497(1)

³ 2013(1) ALD 567

examine the merits of the case of the plaintiff and that if the *ex parte* decree is passed without even minimum application of mind by the trial Court, such an *ex parte* decree cannot be allowed to be enforced.

Placing reliance on this decision 3rd cited, it is contended that in the case on hand also the *ex parte* decree is one passed without application of mind and that the *ex parte* judgment of the trial Court does not disclose any application of mind.

7. On the contrary, learned counsel for the plaintiffs while supporting the orders of the Court below and while reiterating their contentions in the counter, which are stated *supra*, in detail, and while adverting to the chronology of events in the matter, strongly contended that the delay from the date of the *ex parte* decree till the date the application for condonation of delay is filed is not explained and that in any view of the matter, the defendant having received the notice in the EP on 01.03.2013 and having entered appearance through her counsel on 01.03.2013 ought to have filed necessary applications immediately thereafter but the instant application was filed in December, 2013 after her objections in the counter in the execution petition were over ruled and further steps were ordered in the execution petition and therefore the delay from the date of the alleged knowledge of the *ex parte* decree till the filing of the instant application for condonation of delay is not explained and that no explanation is offered for the long delay and that the petition is filed with a *mala fide* intention and that the suit of the defendant for perpetual injunction was also dismissed and hence, the order of the trial Court needs no interference and that the revision is devoid of merit. Learned counsel would also submit that that the trial Court passed a reasoned judgment in the suit while decreeing the suit *ex parte* and that in the judgment, the trial court made a brief reference to the facts and that the 1st plaintiff was examined as PW1 and a supporting witness was also examined as PW2 and further held that exhibits A1 to A7 and the evidence brought on

record sufficiently proved the suit claim and hence, the trial Court decreed the suit and that therefore the judgment in the suit was passed after application of mind; and in any view of the matter if the defendant is aggrieved of the judgment and *ex parte* decree she ought to have preferred an appeal; but, she cannot question the validity of the judgment and *ex parte* decree in an application filed under Section 5 of the Limitation Act and that as per settled law even an *ex parte* decree shall be deemed to be a decree granted on merits.

8. I have bestowed my attention to the facts and submissions.

9. It is well settled principle that expression 'sufficient cause' under Section 5 of the Limitation Act 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.

10. 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. 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.'

11. Reverting to the facts of the case, admittedly, in the suit filed by the plaintiffs for declaration of title and recovery of possession, the defendant entered appearance by engaging counsel, G. Chandrasekhar, B. Mallikharjuna Rao, G. Rajesh Babu and M. Vinod, who filed vakalat for the defendant on 10.09.1998. Even prior to the instant suit, the defendant filed a suit for perpetual injunction and sought for appointment of a Commissioner in the said suit; and, according to the plaintiff herein the Commissioner could not execute the warrant in the said suit due to non co-operation of the defendant herein and that the said suit of the defendant herein was eventually dismissed for default and non prosecution by the defendant. Be that as it may. The defendant having entered appearance in the instant suit failed to file written statement and therefore she was set *ex parte* on 19.12.2008. Thereafter she filed IA.no.56 of 2009 for setting aside the *ex parte* order and the trial court allowed the said petition subject to payment of costs; however, for non payment of costs and non compliance of the said condition imposed, the said application was dismissed. Later, the suit was decreed *ex parte* on 31.03.2009. The plaintiff filed EP.no.174 of 2012. Rule 22 notice was ordered and served. Later, the defendant-JDr entered appearance through her counsel, G.

⁴ AIR 2011 SUPREME COURT 1150

Chandrasekhar, on 01.03.2013. She filed her counter in the Execution Petition on 10.04.2013. Later her said counsel passed away on 04.07.2013. She then engaged another advocate and got filed the present application for condonation of delay on 02.12.2013. Since the defendant entered appearance in the suit and later remained *ex parte* and she has also contested the EP, she cannot be heard to say that she has no knowledge of the *ex parte* decree. In deed, she received notices in the EP and entered appearance on 01.03.2013. In that view of the matter, by that date, 01.03.2013, she is very much aware of the *ex parte* decree. Her former counsel was very much alive and entered appearance on her behalf in the EP. Therefore her explanation that on account of the death of her counsel she could not prosecute her defence in the suit appears to be not correct and cannot be countenanced. Having thus come to know of the *ex parte* decree in any case on 01.03.2013, she did not seek to set aside the *ex parte* decree with required promptitude and within a reasonable time from 01.03.2013. A casual explanation was offered that since her counsel died certain time was lost in collecting the record from the counsel's office and therefore the delay had occasioned. Thus, no explanation whatsoever was offered for the delay from 01.03.2013 till 02.12.2013 on which date the present application for condonation of delay was filed. Thus, there is no justification for seeking condonation of the said delay. On a careful consideration it appears that the averments made in the affidavit filed in support of the petition, do not constitute a sufficient cause for condonation of the delay. Further, the long unexplained delay cannot be condoned as the averments, which are unsubstantiated do not constitute a sufficient cause for condonation of long delay and as it appears from the facts borne out by the record that there is no justification for the long delay. 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. Hence, this court cannot condone the delay in a case where the Court concludes that there is no justification for the delay.

Thus, in the facts and circumstances of the case, the delay cannot be condoned as the petitioner who is seeking condonation of delay had failed to demonstrate that the cause that had prevented her 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.

12. In the decision in *Esha Bhattacharjee V/s Managing Director of Raghunathpur Nafar Academy and others*⁵, the Supreme Court having referred to the 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 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 rules of reason and justice. In *Brijesh Kumar and others V/s State of Haryana and others*⁶ 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

⁵ 2014 (1) ALD 21 (SC)

⁶ 2014 (4) ALD 1 (SC)

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.”

The ratios in the above referred cases squarely apply to the facts of the instant case. On the above analysis this Court finds that no cause much less sufficient cause was shown for condonation of the long delay and that the 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 petitioner for condonation of delay and that there is no merit in the revision.

13. Before parting, it is to be noted that as the delay has not at all been explained from 01.03.2013 to 02.12.2013 by giving explanation much less valid explanation; and, as no sufficient cause has been shown for condonation of the long delay and as the delay is directly a result of negligence, default and inaction of the defendant, the decisions relied upon in support of the contentions of the defendant do not advance her case any further, in the facts and circumstances of the case.

14. In the result, the Civil Revision Petition is dismissed.

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

17th January, 2017
Vjl

M. SEETHARAMA MURTI, J