

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.5582 of 2016, Tr.CMA.No.184 of 2017
And Civil Revision Petition No.865 of 2017

COMMON ORDER:

The revision petitioner in CRP No.5582 of 2016 and the appellant in the Tr. CMA is the plaintiff in the suit OS.No.54 of 2006 on the file of the learned Senior Civil Judge, Sangareddy. The contesting respondent is the 5th defendant. The second CRP No.865 of 2017 is filed by the 5th defendant.

2. I have heard the submissions of Sri P. Gangaiah Naidu, learned senior counsel representing Smt.G. Bhanu Priya, learned counsel for the plaintiff/petitioner in CRP.No.5582 of 2016 who is also the appellant in Tr.CMA.184 of 2017 & 1st respondent in CRP.No.865 of 2017. I have also heard the submissions of Sri M. Chalapathi Rao, learned counsel for the 5th defendant, that is, the 1st respondent in CRP.no.5582/ 16 & the Tr.CMA and the petitioner in CRP.No.865 of 2017.

3. I have perused the material record.

4. The parties shall hereinafter be referred to as the plaintiff and the 5th defendant for convenience and clarity.

5. The introductory facts are as follows: The suit of the plaintiff was decreed *ex parte*, on 19.07.2011. Hence, the 5th defendant in the suit filed two interlocutory applications in IA.Nos.752 & 753 of 2015 in the said suit. The first application was filed under Section 5 of the Limitation Act, 1963, requesting to condone the delay of 1558 days in filing the application seeking to set aside the *ex parte* decree; and, the second application was filed requesting to set aside the *ex parte* decree passed in the said suit. The plaintiff opposed both the applications by filing counters. The trial Court allowed both the applications.

5.1 Aggrieved of the order of the trial Court, dated 27.09.2016, allowing the application for condonation of the delay, the plaintiff filed the CRP No.5582 of 2016.

5.2 Aggrieved of the order of the trial Court, dated 27.09.2016, allowing the application to set aside the *ex parte* decree, the plaintiff originally filed CMA.No.10 of 2016 on the file of the Court of the learned VII Additional District Judge, Medak at Sanga Reddy. The said CMA on transfer to this Court is numbered as Tr.CMA.No.184 of 2017.

5.3 In the said CMA, the plaintiff filed IA No.906 of 2016 under Order XLI Rule 5 of the Code requesting to suspend the operation of the order, dated 27.09.2016, of the trial Court in I.A.No.753 of 2015, pending disposal of the CMA filed against the order in IA.No.753 of 2015. The learned VII Additional District Judge, Medak at Sanga Reddy, allowed the said petition by orders dated 03.01.2017, and suspended the order in IA.No.753 of 2015 till disposal of CMA.No.10 of 2016. Aggrieved of the said orders of suspension granted by the appellate Court, the 5th defendant filed CRP.No.865 of 2017.

6. Since the genesis for the these three matters are the orders of the trial Court allowing the applications of the 5th defendant respectively filed under Section 5 of the Limitation Act, 1963, and Order IX Rule 13 of the Code of Civil Procedure, 1908, and as the contentions of the parties before this Court in all the three matters are identical and as the decision in one of the matters will have a bearing on the decision to be taken in the other matters, all the three matters were heard together and are being disposed of by this common order, as desired by both the sides.

7. The case of the 5th defendant in support of his requests for condonation of delay and setting aside the *ex parte* decree, as stated in his original affidavits and the rejoinder/ additional affidavit, in brief, is as follows: 'The

plaintiff filed the suit against the defendants 1 to 3 for specific performance of an agreement of sale, dated 10.06.2005. The defendants 1 to 3 filed their written statement denying its execution and the thumb impression and signature thereon. This 5th defendant purchased the suit schedule property from the 4th defendant through registered sale deed, dated 31.07.2008. His name was also mutated in the revenue records as pattedar and possessor and he was also issued passbook and title deed book in respect of the suit schedule property. While so, on 23.11.2015, when this defendant was at the suit schedule property a third party came to the property and informed him that an Execution Petition is pending against the suit schedule property and that the said person intends to purchase the property. On that day only this defendant came to know about the proceedings in the Court. He further came to know that an *ex parte* decree was passed, on 19.07.2011. All the other defendants and the plaintiff colluded with each other. This defendant has not received any notice from the Court at the address mentioned in the sale deed of this defendant. On enquiries, he came to know of the following facts: - "The afore-said suit was dismissed for default. The 3rd defendant subsequently sold the suit land to 4th defendant under a registered sale deed. The 4th defendant was impleaded as a party to the suit, at his own request. He filed a written statement stating that he sold the land to this 5th defendant. On that the plaintiff filed IA.No.585 of 2009 under Order I Rule 10 of the Code requesting to implead this defendant as 5th defendant to the suit. In that petition, the particulars of this defendant are stated as 'M.Paman Naidu, S/o.M.Alenna, resident of Vanaparathi village, Mahaboobnagar District.' The plaintiff also filed certified copy of the sale deed of this defendant. The said petition ought to have been returned by the Court with an objection to give full address particulars for service of notice and summons, as no house number or municipal number or panchayat number or street or locality as required under Rule 11 of

Civil Rules of Practice are furnished. In-fact this defendant is not a resident of Vanaparthi. But, by mistake it was wrongly typed so in his sale deed. To avoid corrections and rewriting, the Sub-Registrar raised objections and demanded to give evidence of the residential proof of this defendant. Therefore, on the same date, this defendant produced LIC premium paid receipt, dated 18.02.2008, wherein the address of this defendant is shown as 'Raman naidu Meenige, Miyapur village, Velagonda Post, Veepanagandla mandal, Kolapur Taluq, Mahaboobnagar District. Vanaparthi is not a small village of Mahabubnagar District. It is a municipality having number of houses with numbers allotted by the municipality and streets with street names. On 10.07.2009, fresh notice was ordered to be served on this defendant and the matter was posted to 19.08.2009. From 10.07.2009 till 19.08.2009, process was not deposited. Subsequently, the matter was adjourned to 09.11.2009 as the Presiding Officer was transferred. By that date the notice was not returned. Suddenly, on 18.08.2010, a petition was filed under Order V Rule 20 of the Code with a prayer to permit to serve the notice on this defendant by substituted service, that is, by means of publication of the notice in Prajashakti Telugu daily newspaper. And, the trial Court ordered to publish the notice in Mahaboobnagar District edition of Eenadu Telugu daily newspaper. Before asking for substituted service, the plaintiff must satisfy the Court that he has exhausted all the alternative remedies available in the procedure as required under Order V Rule 20(1) of the Code. Thereafter, and on the Court being satisfied that the remedies stipulated in Rule 20(1) of Order V of the Code are exhausted, the Court may order for service of notice by substituted service. The plaintiff succeeded in playing fraud on the Court and satisfied the Court that substituted service is due service on this defendant. Explanation to Article 123 of the Limitation Act reads that the substituted service under Rule 20 of Order V shall not be deemed as due service. On filing the notice published in

the said paper, dated 13.09.2010, this defendant was directed to be added as 5th defendant in the suit, without due service of notice. On 09.11.2010, notices were ordered to be served on this defendant by registered post and through court; but, no process was deposited. On 28.01.2011, fresh summonses to this defendant through Court and by RP were ordered. On 04.03.2011, the Presiding Officer was on leave; but, one postal acknowledgment with a thumb impression of one Pullaiah was filed; the same bears the postal seal of Sangareddy and not of Vanaparthi. The said Pullaiah is not the family member of this defendant. The suit was posted to 08.04.2011. The said notice said to have been served on this defendant for his appearance on 08.04.2011 is not on record. Without any such acknowledgment being placed on record, the Court believed the misrepresentation of the plaintiff and recorded that this defendant is called absent and set him *ex parte*." The same is against the principles of natural justice. Admittedly, as per the address of this defendant shown in the plaint, he is resident of Vanaparthi village, which is a place outside the jurisdiction of the trial Court. Under Order V Rule 9 (4) of the Code as amended, sending notice by registered post to the person residing outside the jurisdiction is prohibited and for service on such person, the summons or notices should be sent only through Court. This defendant is not served with any notice or summons through Court or by registered post. Thus, this defendant was impleaded as a party defendant without due service of notice and was also set *ex parte* in the suit without due service of summons and eventually an *ex parte* decree was passed. This defendant came to know of the same, on 23.11.2015. Immediately the present two petitions are filed. This defendant is in peaceful possession and enjoyment of the suit schedule property. This defendant may be given an opportunity to contest the suit. The delay in seeking to set aside the *ex parte* decree had occasioned in the said circumstances. It is not due to any intentional and wanton reasons. Valuable

civil rights in immovable property are involved in the suit. Therefore, if the delay is not condoned and thereafter the *ex parte* decree is not set aside this defendant would suffer serious and irreparable loss.”

8. Per contra, the case of the plaintiff as stated in the counters, in brief, is this:

The material allegations in the affidavits filed in support of the petitions are all false. The 5th defendant was impleaded on the application made by the plaintiff. The 5th defendant was set *ex parte* after giving ample opportunity. For the best reasons known to the 5th defendant, he did not appear before the trial Court and allowed the Court to pass a decree. After lapse of 4 ½ years, he came up with the present applications. Subsequent to the passing of the decree, on 19.07.2011, the plaintiff filed E.P.No.95 of 2012; and, a registered sale deed was executed in his favour, on 20.11.2015, *vide* document no.21014/ 2015. Since the date of suit agreement of sale, the plaintiff is in physical possession of the suit property which is adjacent to his other lands wherein he was carrying on gas business under the name and style ‘Hyderabad Gas Company’. The defendants 4 and 5 colluded and created the alleged sale deed in favour of the 5th defendant. The 5th defendant and his vendor are watching the suit proceedings from behind. Mere mutation of the name of the 5th defendant in the revenue records will not create any right or authority. The 5th defendant intentionally did not receive the suit summons; however, he has knowledge of the suit proceedings. The averment that the 5th defendant came to know of the pendency of the EP when he was at the suit property is denied. The decree passed by the Court is not an *ex parte* decree. The 5th defendant is not in possession of the suit property. The plaintiff has been in possession of the property from the date of agreement of sale. In catena of decisions, the Supreme Court and High Courts held that the petitioner has to explain sufficient reasons for the delay and shall make out sufficient cause for

condonation of the delay. The delay is not satisfactorily explained by the 5th defendant. In the absence of the same, the petition for condonation of delay is liable to be dismissed and consequently, the petition to set aside the *ex parte* decree is also liable to be dismissed.

9. At the hearing before the trial Court, no oral and documentary evidence was adduced. On merits and by the orders impugned, the trial court allowed the petitions of the 5th defendant. Aggrieved thereof, the plaintiff is before this Court.

10. Learned counsel for the plaintiff while reiterating the pleaded case of the plaintiff, which is stated supra, in detail, and while adverting to the chronology of events in the matter, strongly contended as follows: 'The delay from the date of the *ex parte* decree and till the date the application for condonation of delay is filed is to be satisfactorily explained by the 5th defendant. No explanation is offered for the long delay. The petitions are filed with a *mala fide* intention. Hence, the orders of the trial Court which are unsustainable need interference. The Court below erred in entertaining IA.No.752 of 2015 since the very application is not maintainable as the suit was decreed on merits after contest by the defendants 1 to 4. The only course left open to the 5th defendant was to file an appeal challenging the decree. Though no sufficient cause was shown for condoning the abnormal delay of 1558 days, the court below erroneously condoned the said unexplained delay of about 4 ½ years. The finding of the Court below that the 5th defendant was not legally served with the notice is perverse and baseless. The reasoning given by the Court below for condoning the abnormal delay is contrary to the well established principles of law. The reasoning of the Court below that the summons wherein the date of appearance was shown as 04.03.2011 were received by the 5th defendant on 09.03.2011 as per acknowledgment and that the 5th defendant was set *ex parte* on 08.04.2011 on which date he was not

expected to come to Court is misconceived. Further, the Court below erred in allowing IA.No.753 of 2015. The Court below, having noticed that the 5th defendant and his vendor purchased the subject suit property *pendente lite*, erred in setting aside the judgment and decree. In that view of the matter, the orders impugned are liable to be set aside.'

11. On the contrary, learned counsel for the 5th defendant while reiterating the contentions of the 5th defendant, which are stated supra, in detail, had supported the orders of the Court below.

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

13. 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.'

14. 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.

15. Reverting to the facts of the case, the pertinent fact which is to be first noted is that the application for impleadment of the 5th defendant was disposed of and the 5th defendant was added to be impleaded after he was set *ex parte* following substituted service namely publication of the notice in Mahaboobnagar District edition of Eenadu Telugu daily newspaper. Thus, before the 5th defendant was directed to be impleaded, there is no personal service upon him either through Court or by post. Be that as it may. After his impleadment in the suit and even after fresh summonses were ordered to be served on the 5th defendant through Court and by RP, there was no personal service on the 5th defendant. However, it appears that one postal acknowledgment with a thumb impression of one Pullaiah was received by the Court, on 09.03.2011, evidencing that the service was effected on 04.03.2011 on the said person. According to the 5th defendant, the said Pullaiah is not a member of his family. It is also borne out by record that on 04.03.2011, the Presiding Officer was on leave. By that date, no report was received by the Court as to whether the notice/ summons was served on the 5th defendant, as

¹ AIR 2011 SUPREME COURT 1150

noted in the orders impugned of the trial Court. Hence, the matter was not called and the suit was adjourned. When the Presiding Officer was on leave, the matter was not placed before the incharge Presiding Officer and no order was taken as to the valid service of summons on the 5th defendant. However, the suit was posted to 08.04.2011. The said notice said to have been served on the said person is not on record as on 08.04.2011. Without any such acknowledgment being placed on record, the Court below set the 5th defendant *ex parte* as he was called absent. The *ex parte* order was passed on 08.04.2011 even without ordering for issuance of fresh summons to the 5th defendant and ultimately the *ex parte* decree was passed on 19.07.2011. The learned Presiding Officer who had set the 5th defendant *ex parte* did not examine as to whether the acknowledgment signed by one Pullaiah can be considered as valid service on the 5th defendant. In-fact the trial Court in its orders, which are impugned by the plaintiff, recorded that it carefully scrutinized and examined the docket orders made by the trial Court and recorded a further finding that the proceedings are held behind the back of the 5th defendant both in the interlocutory application filed for his impleadment and also in the suit and, therefore, there was sufficient cause for non appearance of the 5th defendant before the Court and contest the application as well as the suit. Having thus carefully analysed the facts and the submissions the trial Court came to a conclusion that the *ex parte* decree deserves to be set aside. The said factual finding recorded based on examination of record by the trial Court cannot be set aside.

16. On the above analysis of facts and events, this Court is satisfied that the impugned orders of the trial Court are sustainable under facts and in law and the contentions of the plaintiff before this Court are devoid of merit and that the revision petition and the transfer CMA filed by the plaintiff are liable for dismissal. This Court also finds that the revision petition filed by the 5th

defendant also can be dismissed as a sequel to the dismissal of the revision petition and TrCMA filed by the plaintiff.

17. In the result, CRP.No.5582 of 2016 & TrCMA.No.184 of 2017 filed by the plaintiff are dismissed confirming the orders condoning the delay in seeking to set aside the *ex parte* decree and the order setting aside the *ex parte* decree. As a sequel, the CRP.No.865 of 2017 filed by the 5th defendant is also dismissed. However, the trial Court is directed to proceed with the trial of the suit and dispose of the suit on its merit as expeditiously as possible and preferably within three (03) months from the date of receipt of a copy of this common order.

Pending miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

27.11.2017
Vjl



M. SEETHARAMA MURTI, J