

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.2916 of 2017

ORDER:

The unsuccessful petitioners-defendants preferred this Civil Revision petition, under Section 115 of the Code of Civil Procedure, 1908, assailing the order, dated 07.06.2017, of the learned Senior Civil Judge, Wanaparthy, passed in IA.no.337 of 2016 in OS.no.79 of 2013 filed by them under Section 5 of the Limitation Act, 1963, ('the Act', for short) requesting to condone the delay of (749) days in filing the application seeking to set aside the *ex parte* decree passed, on 28.08.2014, in the aforementioned suit.

2. I have heard the submissions of Sri Rathanga Pani Reddy, learned counsel for the revision petitioners-defendants, and of Sri V.Hanumanth Rao, learned counsel for the respondents 1 to 5-plaintiffs. I have perused the material record.

3. The case of the defendants, as stated by the 1st defendant, in support of their request for condonation of delay, in brief, is as follows:

The 2nd defendant is his brother. The plaintiffs filed the afore-said suit for declaration of title and recovery of possession. On receipt of the notices in the Execution Petition, the defendants came to know that an *ex parte* decree was passed against them, on 28.08.2014. The 1st defendant suffered with Typhoid and was admitted in hospital from 25.07.2014 to 30.08.2014; later he was under bed rest for a period of two months. As such the defendants could not know about the proceedings of the case before the Court. Had the 1st defendant been hale and healthy, the defendants would have contested the suit. The suit lands were purchased by the father of the defendants in the year 1972 and he has been personally cultivating the suit lands till his death in the year 2007. After his death, the lands were mutated in the names of the defendants. The defendants have paid land revenue and also obtained loan

from a Bank by depositing with the bank, the pass book and title deed book pertaining to the suit land. The defendants have been in exclusive possession of the suit land to the knowledge of the plaintiffs and their father. At the time of mutation proceedings, notices were served on the father of the plaintiffs. Therefore, the plaintiffs are not entitled for declaration of title over the suit land. The failure of the defendants to defend the suit is not intentional but only due to the above said reasons. The delay in seeking to set aside the *ex parte* decree had occasioned in the said circumstances and is not due to 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 the defendants would suffer serious and irreparable loss.

4. In contrast, the case of the plaintiffs as stated in the counter filed by the 1st plaintiff, in brief, is this:

The material allegations in the affidavit filed in support of the petition are all false. The delay is intentional. The defendants received the court notices and engaged one S.Baleesharaiah, advocate. Several and adequate adjournments were granted to the defendants to file their written statement. The defendants failed to file their written statement. As such, they were set *ex parte*. The trial Court having considered the material on record decreed the suit, on 28.08.2014. Thereafter, the plaintiffs filed E.P.No.16 of 2016. Notices issued to the defendants in the said E.P were received by them on 27.03.2016 and they entered appearance through T. Shiva Reddy, advocate, on 21.04.2016. Since the defendants failed to file their counter in the EP despite granting several opportunities, the executing Court set the defendants/ JDrs *ex parte*, on 09.09.2016, and issued warrant for delivery of possession. The warrant was executed by the Field Assistant of the Court, on 07.10.2016, by following due procedure. Accordingly, the decree was executed and the plaintiffs got possession of the suit schedule property; and, the EP was terminated (closed),

on 14.10.2016. Thereafter, the present petition is filed. Unfortunately, the said petition is registered instead of rejecting it. The question of setting aside the *ex parte* decree after the same was executed does not arise. The averment in the affidavit that the 1st defendant fell ill and was admitted in hospital for treatment is not supported by any medical evidence. In-fact both the defendants jointly prosecuted the case and the EP by engaging an advocate till they remained *ex parte* in the suit as well as the EP. No explanation is offered as to why the 2nd defendant could not prosecute the case. The defendants have to show sufficient cause to condone the delay. The petition is filed without showing any cause. The petition is liable to be dismissed.

5. At the hearing before the trial Court, no oral evidence was adduced. However, exhibit P1 was marked on the side of the defendants and exhibits R1 to R7 were marked on the side of the plaintiffs. On merits and by the order impugned in this revision, the trial court dismissed the petition of the defendants. Aggrieved thereof, the defendants are before this Court.

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

The Court below ought to have given an opportunity to the defendants to contest the suit at-least by imposing costs. The Court below ought to have seen that the defendants are not only illiterates but also wholly innocent. They were embittered by the advocates in the trial Court. The Court below ought to have taken a sympathetic view of the matter. The Court below ought to have seen that the father of the plaintiffs sold the land in question to the father of the defendants whereas the present suit is filed by the plaintiffs contending that the defendants and their father were only tenants. When the rights of the parties pertaining to the substantial extent of land are involved, the Court below, instead of sticking on to the technicalities, ought to have

been liberal and allowed the petition, if necessary by imposing exemplary costs for compensating the other side. The Court below ought to have seen that the Apex Court in number of judgments held that when the suit pertains to substantial civil and property rights of the respective parties it is always desirable in the interest of justice to decide the same on merits by setting aside the *ex parte* order/decree by compensating the other side by way of costs or exemplary costs but the rights of the parties should not be allowed to be defeated without deciding the cause on merits. The Court below ought to have seen that the crops being raised in the suit land are the only source of livelihood of the defendants.

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

Rafiq and another v. Munshilal and another¹ is relied upon in support of the proposition that for the misdemeanor or inaction of the counsel the party shall not be allowed to suffer.

State of Bihar and others v. Kameshwar Prasad Singh and another² is relied upon in support of the contention that a liberal approach is to be adopted while exercising the power to condone the delay and that the said power has been conferred upon the Court to enable to do substantial justice to parties by disposing of matters on merit. In this decision, the Supreme Court referred to its earlier decision in Collector, Land Acquisition v. Katiji [(1987)2 SCC 107] wherein the following principles were laid down.

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

¹ AIR 1981 SC 1400

² (2000) 9 SCC 94

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of *mala fides*. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

N. Balakrishnan v. M. Krishnamurthy³ is relied upon in support of the proposition that in every case of delay there can be some lapse on the part of the litigant concerned and that alone is not enough to turn down his plea and to shut the door against him and that if the explanation does not smack of *mala fides* or it is not put-forth as a part of dilatory strategy, the Court must show utmost consideration to the suitor but when there is a reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the Court shall lean against acceptance of the explanation.

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 stating 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 defendants having received the notices in the EP, on 27.03.2016, have entered appearance through counsel, on 21.04.2016, and eventually, on 07.10.2016, the decree was executed; but, the instant application was filed on or after 17th October, 2016; 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 hence, the order of the trial

³ (1998) 7 SCC 123

Court needs no interference and that the revision is devoid of merit. Learned counsel would also submit 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 further held that the evidence brought on record including exhibits A1 to A11 sufficiently proved the suit claim and accordingly decreed the suit; therefore, the judgment in the suit was passed after application of mind; as per settled law even an *ex parte* decree shall be deemed to be a decree granted on merits. He finally submitted that if the *ex parte* decree is set aside after its execution, the plaintiffs suffer serious loss and valuable rights that had accrued to them stand defeated.

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. Veena⁴]. 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.'

Reverting to the facts of the case, it is to be noted that the defendants who are brothers having entered their appearance in the suit, later remained *ex parte* having not filed their written statement. They did not take steps for setting aside the *ex parte* order and to contest the suit. It appears that they having come to know of the result of the suit had kept quiet for reasons best known to them. As per law, when they had entered appearance and later remained *ex parte*, it shall be presumed that they know the result of the suit unless the contrary is alleged and proved. The plaintiffs/ DHrs filed the EP for delivery of the property, on 20.07.2015. Even after the notices in the EP were served upon the defendants, they did not take steps for seeking to set aside the *ex parte* decree. They having entered appearance in the EP by engaging a counsel had later remained *ex parte*, on 09.09.2016, even in the EP as per the material facts borne out by the record. Later, the executing Court issued warrant for delivery of the suit schedule property and directed delivery of the

⁴ AIR 2011 SUPREME COURT 1150

said property to the plaintiffs. The Field Assistant of the Court executed the delivery warrant, on 07.10.2016, and thus possession of the suit schedule property was delivered to the plaintiffs through Court and the EP was terminated, on 14.10.2016. All these chronological events are borne out by the order impugned and are not in dispute. Therefore, the defendants had ample opportunity during the pendency of the suit to seek to set aside the *ex parte* order against them and to contest the suit. They did not avail the said opportunity and allowed the suit to be decreed *ex parte*. Even after receiving notices in the EP, they did not take prompt steps for filing application for setting aside the *ex parte* decree. They having entered appearance in the EP had remained *ex parte* in the EP and allowed the decree to be executed and the property to be delivered to the plaintiffs/ DHrs. The above conduct of the defendants lays bare that they are grossly and deliberately negligent in the matter and adopted dilatory tactics and filed the petitions viz., one for setting aside the *ex parte* decree and the other for condonation of delay of 749 days by baldly alleging that the first defendant was unwell and bedridden. No explanation is offered for the 2nd defendant not pursuing the defence in the suit as well as in the EP and for not seeking to set aside the *ex parte* decree at the earliest opportunity. Exhibit P1-medical certificate which relates to the period 25.07.2014 to 30.08.2014, as rightly held by the Court below is of no avail to the defendants, in the facts and circumstances of the case, and to explain the long delay of 749 days, which is a delay of more than two years. A plain perusal of the affidavit filed in support of the application for condonation of delay reflects that the application is filed in a casual manner without giving any valid explanation, with necessary details, for the long delay. When the delay is a long delay of more than 700 days, such delay ought to have been explained by offering valid explanation, with all necessary details and not in a casual manner. The laconic pleading lays bare that the delay is wilful and deliberate and obviously, there is no explanation, much less valid explanation,

for the long delay. The facts of the case and the conduct of the defendants reflect that the delay is deliberate and is on account of culpable negligence and *mala fides* on the part of the defendants. Thus, on facts, the defendants are not entitled to the relief as rightly held by the Court below. Hence, the ratios in the decisions cited which are referred to supra do not advance the case of the defendants any further. 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. 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 casual and 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. Further, in the facts and circumstances of the case, the delay cannot be condoned as the defendants, who are seeking condonation of delay, had failed to demonstrate that the cause that had prevented them from pursuing the remedy had sprouted before the expiry of limitation and continued and prevented them from taking necessary steps till the date the application is filed.

11. In the decision in Esha Bhattacharjee V/s Managing Director of Raghunathpur Nafar Academy and others⁵, 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:

⁵ 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 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 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 afore-stated two cases squarely apply to the facts of the instant case.

12. On the above analysis, this Court finds that the Court below is justified, in the facts and circumstances of the case, in not allowing the application filed by the defendants for condonation of delay and that the revision petition of the defendants deserves to be dismissed.

13. In the result, the Civil Revision Petition is dismissed confirming the order of the trial Court.

⁶ 2014 (4) ALD 1 (SC)

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

27.11.2017
Vjl

M. SEETHARAMA MURTI, J

