

HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

CIVIL REVISION PETITION No.2489 OF 2017

ORDER:

The petitioner in I.A. No.115 of 2016 and 1st defendant in O.S. No.22 of 2015 is the present revision petitioner.

2. Aggrieved of the order dated 28.04.2017 in I.A. No.115 of 2016 in O.S.No.22 of 2015 on the file of Senior Civil Judge, Kamareddy, whereby and whereunder his request to condone the delay of 85 days in filing the petition to set aside *ex parte* decree dated 30.05.2015 was disallowed, he preferred the present Civil Revision Petition under Section 115 of the Civil Procedure Code, 1908 (for short, 'C.P.C.').

3. Heard Sri M. Subba Reddy, learned counsel for the petitioner and Sri Jithender Rao Veeramalla, learned counsel for the 1st respondent. 2nd respondent is not a necessary party as per the endorsement made in the cause title of the Revision petition.

4. The learned counsel for the petitioner would submit that due to ill health the petitioner could not file the written statement within time and the Senior Civil Judge was pleased to set the petitioner *ex parte* and passed *ex parte* decree in a money suit. I.A. No.115 of 2016 was to condone the delay of 85 days in filing set aside petition of *ex parte* decree dated 30.5.2015 filed by the petitioner under Section 5 of the Limitation Act, 1963, pleading ill-health, and

the learned Senior Civil Judge was not right in dismissing the said application for the reason that liberal approach ought to have resorted to in delay condonation petitions filed under Section 5 of the Limitation Act, despite showing cause.

5. The learned counsel for the 1st respondent would strongly resist the request contending that firstly, the 1st respondent filed the suit (O.S. No.22 of 2015) for recovery of Rs.7,75,000/- based on hand loan taken by the revision petitioner agreeing to repay the amount of Rs.6,84,000/- with interest at 24% p.a. and executed five separate demand promissory notes for Rs.1,50,000/- each, the last being for Rs.84,000/- on 8.12.2004 on the guarantee given by the 2nd respondent, but, instead of repaying the amount, the revision petitioner has set up the plea of fabrication of promissory notes, which is borne out from the affidavit averments filed along with petition.

6. His next submission is that the revision petitioner not only set up the plea of fabrication of promissory notes by the 1st respondent, but also, by filing I.P. No.1 of 2015 in which the 1st respondent was shown as respondent No.13 in the list of creditors showing the amount as Rs.6,80,000/- , but in the B-schedule list of properties the revision petitioner has not shown any immovable property standing in his name intentionally to deceive the 1st respondent, whose submission is that on receipt of notice for attachment before judgment in I.A. No.117 of 2015 they engaged an advocate, Mr. Lakshmana Rao, who, on 8.7.2015 entered appearance

and I.A. was posted to 10.7.2015, on that day the revision petitioner did not furnish any security and as such the petition schedule property was ordered to be attached and it was adjourned to 24.7.2015 for counter. Thereafter, it was adjourned from time to time till 17.11.2015, but there was no representation on behalf of the revision petitioner and no counter was filed, and that that was the reason why he was set *ex parte* and *ex parte* decree was followed.

7. It is also his submission, the very fact that the revision petitioner filed I.P. No.1 of 2015 and even shown the 1st respondent as creditor in the list of creditors showing amount also as Rs.6,80,000/-, but taking plea in the affidavit that promissory notes have been fabricated are mutually inconsistent and only with a view to obtain order in I.P. No.1 of 2015, that too without showing the properties sought to be attached in I.A. No.117 of 2015 in Schedule-B list of properties in Insolvency Petition would all reflect the conduct of the revision petitioner, to disentitle his request to seek condonation of delay not only for the reason that cause is not sufficient cause to condone the delay but also in view of the aforesaid conduct of the revision petitioner as no purpose would be served even if he is allowed to contest.

8. A perusal of the affidavit filed along with petition in I.A. No.115 2016 would show that due to continuous ill health he was unable to move from bed and attend the Court and, therefore, the

delay has occurred. It would be appropriate to extract three paragraphs in the affidavit for arriving at a just conclusion, which read thus:

“It is submit that the respondent/plaintiff herein filed false suit on the false allegations and created and forged documents with forged signatures, only to harass the petitioner/defendant filed present suit on false allegations.

It submit that the above case non filing of the written statement this Hon’ble Court was pleased to pass ex parte decree against the petitioner/defendant on

I submit that due to continuous ill health I could able to move from the bed till this day hence I could not ale to attend before this Hon’ble court and file set aside petition and written statement in time, due to the above said reason caused delay of 85 days from 30.1.2016 to 23.4.2016 for filing setting aside petition and written statement. I submit that I have good grounds to contest the above case.”

9. Generally, what is required to decide an application filed under Section 5 of the Limitation Act where the delay is not inordinate nor huge, the Courts would resort to liberal approach in allowing such applications, but the case on hand is a typical one for the following three reasons.

Firstly, the cause shown by the petitioner to condone the delay of 85 days from 30.01.2017 to 24.2.2017 is termed by him as ‘continuous ill health’, which disabled him from moving out of bed. The nature of ailment is not described by him. Had he shown at least nature of ailment with which he said to have suffered, there would have been some merit in considering sufficient cause. Even though there are no medical certificates or test reports only during the course of arguments learned counsel feebly submit that the revision petitioner suffered from jaundice, perhaps, with a view to give colour of reality to the alleged continuous ill health as there is no allopathic treatment for the said disease. Even otherwise, the petitioner would have

undergone tests as to Liver functioning in which direction no indication at all is shown by him. Therefore, it is to be held that the affidavit filed by him for condonation of delay is totally bereft of relevant details. It is, therefore, difficult to agree with the learned counsel for the revision petitioner that the petitioner is successful in showing that there is sufficient cause to condone the delay of 85 days in filing the petition to set aside the *ex parte* decree.

Second, as already detailed in the above, the petitioner herein instead of contesting the suit (O.S. No.22 of 2015) and the interlocutory application (I.A. No.117 of 2015) filed for attachment before judgment, approached the Court with Insolvency Petition No.1 of 2015. No doubt, the petitioner has right to approach Insolvency Court, but, the fallacy is exposed from the circumstance that he has not only shown the 1st respondent as creditor in the list of creditors showing even the amount borrowed as Rs.6,80,000/-, which amount is slightly less than actual amount borrowed i.e., the difference being Rs.4,000/-, but also, he did not even disclose the property, which is sought to be attached in I.A.No.117 of 2015 in the B schedule properties shown in the said Insolvency Petition.

It is, thus, clear only with a view to either to defeat the decree that would be passed against him in the aforesaid suit or to wriggle himself out of the clutches of the repayment, he appears to have approached Insolvency Court. Even otherwise, the fact that he has shown the amount as Rs.6,80,000/- would, certainly, falsify the ground which he has agitated in his affidavit filed in I.A. No.115 of

2016 i.e., delay condonation application, as he has set out fabrication of documents submitted by the 1st respondent/plaintiff.

Thus, the defence which he sought to introduce by filing written statement, which is already projected in the present affidavit, is sufficient to view that even looking at merits of the case there appears to be no ground to resist the suit. It is not as though basing on this ground alone his request in the present Revision Petition is intended to be rejected, but it is mainly based on insufficiency of sufficient cause attempted to be shown by him to condone the delay in filing the petition to set aside *ex parte* decree.

Third, the petitioner has rushed to this Court only after execution petition (E.P. No.9 of 2016) was filed by the 1st respondent sometime in the month of April, 2016. In fact, he has shown the date in I.A.No.115 of 2016 as 23.4.2016 in the petition and filed on 24.3.2016. It appears only on either service of notice in execution petition or coming to know about filing of execution petition he rushed with the present application to condone the delay in filing the petition to set aside *ex parte* decree passed by the Senior Civil Judge.

10. The learned counsel for the petitioner placed reliance in **Nigulapu Raju v. Tirupathi**¹ where the delay of about 250 days in filing the petition to set aside the *ex parte* decree, a learned Single Judge of this Court held that existence of sufficient cause is open to liberal construction and the inconvenience, if any, caused to opposite

¹ 2009 (5) ALD 596

party, if can be compensated by appropriate terms, such conditions should be imposed instead of refusing to determine dispute on merits in accordance with law. It was a case where there was undisputed deaths of two counsel of defendant/revision petitioner during relevant period and the cause shown by the petitioner was found to be sufficient cause.

11. In **G. Hari Babu v. Langula Krishnaiah Goud and others**², a learned single Judge of this Court while examining the scope of Section 5 of the Limitation Act, held in paragraph-9 thus:

“9. It is now a crystallized principle in our jurisprudence that condonation of delay is a matter of discretion of the Court and Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain or even a reasonable limit. Length of delay, is, thus, not of significance, but what is *most vital is the acceptability of the explanation* and that was the only criteria by which the cause for condonation of delay should be judged. The main purpose for which Section 5 was enacted was to enable the Court to do substantial justice and that is the precise reason why very elastic expression ‘sufficient cause’ is employed therein, so as to sub-serve the ends of justice. It is well to remember that the very purpose sought to be achieved by the Courts is to sub-serve the ends of justice. Therefore, when substantial justice and technical consideration are pitted against each other, cause of substantial justice had to be preferred to that of the technicalities, inasmuch as, *no party can ever claim a vested right when injustice is being done, all due to the delay* in approaching the Court by the other party.”

and rejected the request to condone the delay of 529 days in preferring the Revision Petitions, and, consequently, rejected the two Revisions.

12. In **Jangana Rajendra Kumar v. Basava Srinivas**³, another learned Single Judge of this Court observed in paragraphs-‘5’ and ‘6’ thus:

² 2016 (2) ALD 477

³ 2013 (2) ALD 273

“5. The Limitation Act, 1963, prescribed limitation with a view to see that a litigant does not drag on the litigation. Section 5 gives an opportunity to a litigant to file applications beyond the prescribed period of limitation provided, he is able to establish that he was prevented by sufficient cause from approaching the Court within the said period. Even though explanation for day-to-day delay is not being insisted by the Courts, the litigant has to nevertheless furnish the satisfactory explanation for filing the application beyond the prescribed period of limitation. This responsibility on the part of the litigant is much more in cases of abnormal delays, for by such delays right came to be vested in his adversary and such a right cannot be easily taken away by making unduly liberal approach by the Court (See *Government of Andhra Pradesh v. Murali Madhava Rao*, 2009 (3) ALD 355 (DB) x 2009 (3) ALT 637 (DB))

6. In the instant case, the explanation offered by the petitioner for condonation of inordinate delay of 681 days is bereft of material particulars regarding the petitioner's sickness and his shifting to Golugonda Mandal from Sabavaram let alone substantiating the said allegations by filing relevant material. The petitioner has not shown any kind of diligence in filing the written statement and contesting the suit and also in filing the application for setting aside the *ex parte* decree within the reasonable time. On considering the conspectus of the facts in their entirety, I am of the opinion that lower Court is more than justified in dismissing the petitioner's application for condonation of delay.”

and rejected the request dismissing the Civil Revision petition.

13. The learned counsel for the 1st respondent placed reliance in **G. Hari Babu** (2 supra) and **Jangana Rajendra Kumar** (3 supra).

14. In the present case, as already discussed in the above, since it is difficult to view the cause of substantial justice gain precedence over technicalities, it is to be stated the said rulings relied on by the learned counsel for the revision petitioner would not render any assistance to advance the case of the petitioner in condoning the delay.

15. Viewed from any angle, the present Civil Revision Petition is devoid of merits, and, therefore, dismissed. There shall be no order as to costs.

As a sequel thereto, Miscellaneous Petitions, if any, pending in the Civil Revision Petition shall stand closed.

A. SHANKAR NARAYANA, J

Dt. 16.08.2017
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