

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.1580 of 2015

ORDER:

The unsuccessful plaintiff preferred this Civil Revision petition, under Article 227 of the Constitution of India, assailing the order, dated 13.12.2014, of the learned IX Additional District Judge, Wanaparthi, passed in IA.no.722 of 2014 in OS.no.12 of 2012 filed by the petitioners-defendants 2 to 6 under Section 5 of the Limitation Act, 1963, ('the Act', for short) requesting to condone the delay of (284) days in filing the application seeking to set aside the *ex parte* decree passed on 19.09.2013 in the aforementioned suit.

2. I have heard the submissions of Sri K. Mahipathi Rao, learned counsel for the revision petitioner-plaintiff and Sri V.Hanumantha Rao, learned counsel for the respondents 1 to 5- defendants 2 to 6. Respondents 6 and 7-defendants 1 and 7 are stated to be not necessary parties. I have perused the material record.

3. The case of the defendants 2 to 6, as stated by the 6th defendant, in support of their request for condonation of delay, in brief, is as follows:

The plaintiff is no other than the paternal uncle of the 6th defendant. Earlier plaintiff filed the suit (OS.no.12 of 2003) on the file of the Court of the learned Senior Civil Judge, Nagarkurnool, against the mother of the 6th defendant for cancellation of the registered gift deed, dated 13.02.2001 bearing document no.360 of 2001, executed by late Rakasi Chinna Hanmanth Reddy in favour of the mother of the 6th defendant. The said suit was dismissed on 25.01.2007. Thereafter the plaintiff filed an appeal in As.no.22 of 2007 before the District Court, Mahaboobnagar, and the same was transferred to the Additional District Court, Wanaparthi, and was renumbered as As.no.38 of 2012. The said appeal suit was also dismissed on 05.11.2013 by the said Court confirming the judgment and decree of the trial Court. The plaintiff

filed the present suit for partition against the defendants 2 to 6 and other defendants by including the property, which is the subject matter of the former suit. While the appeal in the former suit was pending, the elders of the village and relatives advised both the parties to settle the matter and accordingly the matter was settled and a simple document was executed on 22.06.2012 whereunder the plaintiff herein had undertaken to withdraw the suit. For that reason, the defendants 2 to 6 reposed confidence on the plaintiff and did not participate in the present suit proceedings thinking that the plaintiff would withdraw the suit and has in fact withdrawn the suit as promised and as canvassed in the village. The said deed is with one Ramachandra Reddy of the village, who is the scribe of the said document. However, after receiving the notices in the petition filed for appointment of a Commissioner, the defendants 2 to 6 realized that the plaintiff cheated and played fraud on them and kept them in darkness and obtained an *ex parte* preliminary decree for partition on 19.09.2013 in the instant suit. Thus the failure of the defendants 2 to 6 to defend the suit is not intentional but only due to the above said *bona fide* belief. The delay that had occasioned in the said circumstances in seeking to set aside the *ex parte* decree 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 and irreparable loss.

4. In contrast, the case of the plaintiff in the counter, in brief, is this:

The material allegations in the affidavit of the 6th defendant are invented for the purposes of delaying the court proceedings. The material allegations in his affidavit are all false. The delay is intentional. Having knowledge of the suit proceedings and being acquainted with the suit proceedings day to day, the defendants 2 to 6 are denying their knowledge about the pendency of the suit. The defendants 1 to 5 are set *ex parte* in the

suit on 23.11.2011. The alleged fact that a settlement deed was entered into on 22.06.2012 on the advice of elders and relatives as pleaded by the defendants 2 to 6 would show that they are aware of the pendency of the suit. Having knowledge of the suit they cannot say that they are surprised on coming to know about the decree in the suit. The alleged deed is not enforced by either of the parties. The said deed was not acted upon ever since its execution and the terms thereof are incapable of enforcement and the said deed does not confer any rights on any of the parties. To the said document dated 22.06.2012, the defendants 2 to 4 are not parties. The allegations in the affidavit are invented. Earlier the plaintiff filed OS no.12 of 2003 on the file of the court of the learned Senior Civil Judge, Nagarkurnool, against defendants 1 to 5 in the present suit for cancellation of the gift deed and the said suit was dismissed. During the pendency of the appeal, As.No.38 of 2012, the plaintiff herein filed written arguments stating that OS no.12 of 2012, that is, the instant suit is pending. Hence, As.no.38 of 2012 was disposed of, on 05.11.2013, while discussing the pendency of the present suit, OS no.12 of 2012, in paragraph 13 of the judgment in As.no.38 of 2012. Thus during the pendency of the said appeal, the defendants 1 to 5 are made aware of the fact that OS no.12 of 2012 was still pending and was not withdrawn. The copy of the judgment in AS no.38 of 2012 discloses the said facts. Therefore, the defendants 1 to 5 are having knowledge of the pendency of OS no.12 of 2012; but, they failed prosecute their defence intentionally. They suppressed the said facts before the trial Court. Hence the petition may be dismissed.

5. On merits and by the order impugned in this revision, the trial court allowed the petition of the defendants. Aggrieved thereof, the plaintiff is before this Court.

6. Learned counsel for the plaintiff would contend that the suit is filed for partition and that the defendants are having knowledge of the suit

proceedings; but, intentionally they did not prosecute their defence. Defendants 1 to 5 were set *ex parte* on 23.11.2011. A suit was earlier filed by the plaintiff herein against the defendants 1 to 5 for cancellation of a gift deed. The said suit was dismissed; and, the plaintiff herein preferred an appeal. In the first appeal while submitting written arguments, the plaintiff brought to the notice of that Court that a separate suit, OS.no.12 of 2012, for partition is filed and pending. Hence, the first appellate court discussed about the present suit in the said judgment and dismissed the said appeal. Therefore, the defendants 1 to 5 herein are aware of the pendency of this suit; but, they did not prosecute their defence. The settlement arrived at was unenforceable and was not acted upon and the defendants 2 to 4 herein are not parties to the settlement. The defendants 1 to 5 had knowledge of the fact that the plaintiff was prosecuting the suit, as the said aspect was mentioned in the judgment in As.no.38 of 2012. The said facts that the defendants 2 to 5 intentionally remained *ex parte* and failed to contest the suit and allowed the suit to be decreed *ex parte* and later leisurely filed the present application for condonation of delay after lapse of 284 days, disclose that the delay is deliberate and intentional. No explanation is forthcoming for the said delay. Therefore the trial court was in error in allowing the said petition. On passing of the *ex parte* decree valuable rights accrued to the plaintiff. Such rights cannot be lightly disturbed by condoning a long delay which is unexplained.

6.1 In support of the said contentions reliance was placed on the decision in Jangana Rajendra Kumar v. Basava Srinivas¹ [2013(2) ALD 273] wherein this court discussed the requirement of giving satisfactory explanation for condonation of delay and held that when there is abnormal delay in seeking to set aside *ex parte* decree and right came to be vested in the adversary, on account of such delay, such a right cannot be easily taken away by adopting an unduly liberal approach by the court. Further, placing reliance on the decision

¹ 2013(2) ALD 273

in Chapala Pedda Thayanna v. Chapala Chinna Thayanna and others² it was contended that when the party seeking condonation of delay lacks *bona fides* such delay cannot be condoned.

7. Learned counsel for the defendants 2 to 6 while supporting the orders of the court below would contend as follows:

The parties are closely related. The plaintiff is no other than the paternal uncle of the 6th defendant. He challenged a document executed in favour of the mother of the 6th defendant by filing OS.no.12 of 2003. The said suit was dismissed. The appeal preferred by him was also dismissed. This suit is filed for partition. The elders and relatives advised to settle the matter and accordingly the matter was settled and a document, dated 22.06.2012, was executed and the said document is with the scribe of the document. As per the terms of settlement the plaintiff promised to withdraw the suit and in-fact canvassed in the village that the suit was withdrawn and thus played fraud on the defendants and cheated them. After the suit is preliminary decreed and when the IA was filed for appointment of a Commissioner, the defendants 2 to 6 came to know about the fraud played by the plaintiff and *ex parte* decree. In the process the delay had occasioned for no fault of the defendants. The delay has not occurred due to wilful and wanton reasons. If the delay is not condoned, the defendants would suffer serious loss as valuable rights in regard to immovable property are involved in the *lis*. The trial court rightly held that the delay has occasioned due to *bona fide* reasons and that the non prosecution of the defendants is only because of the settlement and the promise made by the plaintiff that he would withdraw the suit in view of the settlement and the acts of cheating resorted to by him in not withdrawing the suit as promised. When the trial court has accepted that the delay has occasioned due to *bona fide* reasons and condoned the delay, no interference is called for by this court

² 2011(1) ALT 181

while exercising the revisional jurisdiction under Article 227 of the constitution of India.

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*³]. 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, it is to be stated that the case of the defendants 2 to 6 is that the plaintiff first filed OS.no.12 of 2003 in Senior Civil Judge’s Court, Nagarkurnool, against the mother of the 6th defendant for cancellation of registered gift deed dated 13.02.2001 and that the said suit was dismissed on 25.01.2007 and that the first appeal in AS.no.22 of 2007 which was later transferred and was renumbered as As.no.38 of 2012 on the file of the Court of the learned IX Additional District Judge, Wanaparthi, was also dismissed on 05.11.2013 and that the present suit OS.no.12 of 2012 filed for partition of the properties includes the property covered by the said earlier suit and that in that view of the matter the elders in the village and relatives of the parties advised the parties to settle the matter and accordingly the matter was settled and a document was reduced into writing on 22.06.2012 and that the same is with the scribe of the document, who is one of the villagers and that the plaintiff having promised to withdraw the suit in view of the said settlement, in fact canvassed in the village that he has withdrawn the suit and that the defendants 2 to 6 having believed that the plaintiff would withdraw the suit did not prosecute their defence; but, to their surprise they received notice in the application filed for appointment of a commissioner and that then they came to know that the plaintiff cheated and played fraud upon them and obtained a preliminary *ex parte* decree on 19.09.2013 and that therefore they are constrained to seek to set aside *ex parte* decree and that in the circumstances stated the delay has occasioned but not due to any wilful and wanton reasons. The vital fact which weighed with the trial Court is that the plaintiff has not disputed the settlement arrived at between the parties on

³ AIR 2011 SUPREME COURT 1150

22.06.2012 and that the only contention of the plaintiff is that the terms of the said settlement are not acted upon and the said document is unenforceable and that the terms thereof cannot be enforced by any of the parties and that some of the defendants are not parties to the said document. Thus during the pendency of the suit there was a settlement is not in dispute. That settlement is being stated as a *bona fide* reason for the defendants 2 to 6 not prosecuting the defence. However, the plaintiff contends that after the dismissal of the OS.no.12 of 2003 filed by him, he preferred the appeal, AS.no.38 of 2012, and that while disposing of the said appeal, the appellate Court referred to the written arguments wherein the pendency of the present suit was mentioned by the plaintiff herein and that therefore the defendants 2 to 6 are very much aware of the pendency of the present suit; but, they allowed the suit to be decreed *ex parte*. However, the said appeal suit was dismissed on 05.11.2013. The *ex parte* decree was passed on 19.09.2013. The defendants 2 to 6 who did not contest the instant suit on the *bona fide* impression that the matter is settled and that the plaintiff would withdraw the suit as promised by him *inter alia* contend that the plaintiff also canvassed in the village that he has withdrawn the suit as promised and that thereafter the plaintiff filed an interlocutory application for appointment of an advocate commissioner pursuant to the preliminary decree and that having received notices in the said application, the defendants approached the trial court with a request to set aside the *ex parte* decree passed in the instant suit and further filed the subject application for condonation of delay as delay had occasioned in seeking to set aside the *ex parte* decree. According to the defendants 2 to 6, but for the settlement and the assurance given by the plaintiff, they would have contested the suit. In the circumstances explained by the defendants 2 to 6 and the further fact that the settlement is not disputed by the plaintiff, whether it is enforceable or not, in the considered view of this Court, the delay cannot be termed as deliberate or that it was on account of culpable

negligence on the part of the defendants 2 to 6. The trial Court accepted the version of the defendants 2 to 6 that on account of the settlement before village elders and relatives of the parties there is nothing *mala fide* on the part of the present defendants 2 to 6 in contending that they did not prosecute the defence because they are under the impression that the plaintiff has withdrawn the suit pursuant to the settlement before the elders and villagers. The trial Court also accepted the version of the defendants 2 to 6 that no harm would be caused to the plaintiff, if the defendants are allowed to contest the suit as the suit was decreed after a settlement was arrived at between the parties and on the failure of the plaintiff to withdraw the suit as promised at the time of settlement. In view of the peculiar facts of the case, the judgments relied upon by the plaintiff wherein the decisions turned on the facts of the individual cases are of no avail to the plaintiff. Thus, when once the court comes to the conclusion that there is justification for the delay the length of delay is not a relevant factor and the acceptability of the explanation is the only criterion. In the facts and circumstances the explanation offered for the delay can be accepted as sufficient cause as the expression 'sufficient cause' is a cause for which the defendants could not be blamed.

12. On the above analysis, this court finds that the trial court is justified in condoning the delay and that therefore, the order of the trial Court brooks no interference.

13. 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.

17.01.2017
Vjl

M. SEETHARAMA MURTI, J