

HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

CIVIL REVISION PETITION No.6208 of 2009

ORDER:

This petition is arising out of the order dated 07.11.2008 in I.A.No.3510 of 2008 in A.S.(SR) No.10888 of 2008 on the file of the I Additional Chief Judge, City Civil Court, Secunderabad.

The revision petitioners, who are the appellants, filed the above said petition under Section 5 of the Limitation Act to condone the delay of 73 days in filing the appeal. The Court below, on consideration of the arguments of both sides, has dismissed the petition with costs as no sufficient cause was shown to condone the delay and that the petitioners were not diligent in prosecuting the case. Being aggrieved by the said order, this revision has been filed.

Heard Sri S.Balchand, learned counsel for the petitioners and Sri V.Ramachander Goud, learned counsel for the respondents.

The facts, in brief, are that O.S.No.158 of 2002 was filed by the petitioners before the XII Additional Senior Civil Judge (FTC), City Civil Court, Secunderabad, for declaration of title and permanent injunction restraining the defendants from alienating the schedule property, whereas O.S.No.74 of 2001 was filed by the respondents for declaration of title, recovery of possession and permanent injunction. Both suits were tried together and by a common judgment and decree dated 21.09.2007, the suit filed by the respondents was decreed and the suit filed by the petitioners was dismissed.

Aggrieved by the said judgment and decree, the petitioners filed two appeals before this Court and they were numbered as C.C.C.A.Nos.292 and 293 of 2007. On 17.04.2008, this Court returned both the appeals for presentation of the same before the appropriate Court within a period of two weeks therefrom. As there was delay in re-submitting the appeals, the petitioners herein filed two Interlocutory Applications i.e., I.A.No.3508 of 2008 to condone the delay of 61 days in filing the appeal arising out of O.S.No.74 of 2001 and I.A.No.3510 of 2008 to condone the delay of 73 days in filing the appeal arising out of O.S.No.158 of 2002. Both the Interlocutory Applications were dismissed by the lower Appellate Court on 07.11.2008. Aggrieved by the said dismissal, the petitioners preferred two Civil Revision Petitions before this Court, C.R.P. (SR) No.5967 of 2009 and C.R.P.No.6208 of 2009. The C.R.P. arising out of the application to condone the delay of 61 days was dismissed by this Court and the matter was carried to the Supreme Court in Special Leave Petition (Civil) No.21018 of 2010, which came to be allowed on 05.01.2011. Ultimately, one of the two appeals filed by the petitioners has been taken on file and is pending as A.S.No.6 of 2011 on the file of the lower Appellate Court.

Though both the Civil Revision Petitions arose between the same parties and in respect of the same property, they were not taken up together. C.R.P.No.5040 of 2009 was disposed of, but the present C.R.P (C.R.P.No.6208 of 2009) was kept pending. Subsequently, the C.R.P. was listed for hearing on 10.03.2011 and as there was no representation, the C.R.P. was posted to 11.03.2011 for dismissal. Since there was no representation on

that day also, the C.R.P. was dismissed for default. C.M.P.(SR) No.22962 of 2009 was filed under Order IX Rule 9 of CPC to set aside the dismissal order and to restore the Civil Revision Petition to file. Since there was delay of 500 days in filing the petition, C.R.P.M.P.No.5409 of 2012 came to be filed. This Court *vide* order dated 06.01.2017 allowed the petition subject to condition of the petitioners paying costs of Rs.5,000/- to the respondents.

Subsequently, the petitioners filed C.R.P.M.P.No.201 of 2017 under Order IX Rule 9 CPC to set aside the order dated 11.03.2011 and restore the C.R.P to its file. The said petition was allowed on 10.02.2017 and the C.R.P. was restored to file.

Learned counsel for the petitioners submits that due to ill-health of the 1st petitioner, who is aged about 83 years, the 2nd petitioner, who is his son, not only taking care of his health but also the business and therefore, he could not prefer the appeal in time. He further submits that when two suits were filed for similar reliefs, one suit was disposed of and the other suit could not be disposed of because of various technical reasons and the delay in preferring the appeal due to ill-health of the 1st petitioner.

Learned counsel for the petitioners placed reliance on the decision reported in **WADHYA MAL. V. PREM CHAND JAIN AND ANOTHER¹**, wherein it is held that:

“We need not take a very strict view of the matter and we consider it appropriate to give an opportunity to the appellant to get his appeal adjudicated on merits on the only ground that the award which he seeks to challenge is under appeal by respondent No.1 and respondent No.2. Guided by these special facts of the case, we allow this appeal, set aside the order of the High Court, rejecting the appeal of the appellant on the ground that it was barred by limitation. We condone the delay in preferring the appeal and direct that the appeal be admitted to file and heard and disposed of along with appeals preferred by respondent No.1

¹ AIR 1982 SUPREME COURT 18

and respondent No.2 pending in the High Court. Appeal allowed to that extent with no order as to costs.”

The subject matter in both the suits filed by the revision petitioners and also the respondents is one and the same. The parties are also similar except one or two additional parties. O.S.No.74 of 2001 filed by the respondents was decreed and O.S.No.158 of 2002 filed by the petitioners was dismissed. The petitioners have preferred two appeals against the common judgment passed in both the suits. They could not pursue the matter because of various technical reasons and health problems.

Learned counsel for the respondents submits that the petitioners have to explain each day's delay for condoning the same. He further submits that right from the beginning, there is negligence on the part of the petitioners and they were not diligent in prosecuting the case.

However, in view of the facts and circumstances of the case, since the delay is said to be 73 days and the 1st petitioner is aged about 83 years and he filed an affidavit to the effect that due to ill-health, he could not prosecute his case, it would be better if the petitioners are given an opportunity to contest the matter.

In view of the submission made by the learned counsel for the respondents that great inconvenience would be caused to them because of non-diligent attitude of the petitioners and after ten years they are coming up for condoning the delay of 73 days without any sufficient cause to condone the delay. The trial Court erred in not allowing the delay condone petition filed for condoning the delay of 73 days. The petitioner's age was 75 years by that date. He had taken plea in the affidavit that due to his old age and

ill-health, he could not prosecute his case. Though there was an affidavit to that effect, it was not considered and the trial Court called for medical certificate. No doubt some inconvenience might have caused to the respondents as the petitioner is seeking for condoning the delay of 73 days after disposal of the other suit, which arise out of the same cause of action. The petitioners opportunity to prosecute their case cannot be denied due to delay of 73 days in filing the appeal.

Therefore, the CRP is allowed and the delay of 73 days is condoned on payment of costs of Rs.10,000/- (Rupees ten thousand only) by the petitioners to the learned counsel for the respondents. Consequently, the order dated 07.11.2008 in I.A.No.3510 of 2008 in A.S.(SR) No.10888 of 2008 on the file of the I Additional Chief Judge, City Civil Courts, Secunderabad, is set aside. The Court below is directed to dispose of the matter within three months from the date of receipt of a copy of this order. Learned counsel for the respondents acknowledged the receipt of Rs.10,000/-. There shall be no order as to costs.

The Miscellaneous Petitions, if any, pending shall stand closed.

Date : 21.02.2017
ssp

GUDISEVA SHYAM PRASAD,J