

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No. 1693 OF 2014

ORDER:

This civil revision petition, under Section 115 of the Code of Civil Procedure, 1908 (for short 'CPC'), is filed challenging the order dated 21.04.2014 in I.A. No.1226 of 2013 in O.S. No.83 of 2010 passed by the Principal District Judge, Warangal, dismissing the petition filed under Section 5 of Limitation Act to condone delay of 631 days in filing a petition under Rule 13 of Order IX of CPC, to set aside the *ex parte* decree dated 03.11.2011.

The parties will hereinafter be referred to as the petitioner and the respondent, for convenience.

The petitioner was the defendant in the suit, he filed a petition under Section 5 of Limitation Act to condone delay in filing a petition under Rule 13 of Order IX of CPC, raising several contentions, denying his liability and agreement to pay Rs.5,000/- per month in 24 installments together with interest in pursuance of the alleged agreement between the parties. It is contended that he had informed his earlier Advocate, to appear for him in the suit, but the Advocate did not file written statement for the reasons known to him and that the petitioner is working as A.R. Constable at Headquarters, Hanmakonda, due to impression that the proceedings in the suit were going on, he could not appear before the court, till he received notice in the execution petition, and he was unaware of passing *ex parte* decree. On receipt of the notice in execution petition, he approached the Advocate, who advised him to attend court personally. Since he is unaware about the

steps to be taken, he appointed an young Advocate to represent him in the execution petition and therefore, he could not approach the court immediately after the receipt of the notice in execution petition, thereby there is delay of 631 days in filing petition under Rule 13 of Order IX of CPC and prayed to condone delay of 631 days in filing petition under Rule 13 of Order IX of CPC.

The respondent filed counter opposing the petition denied the material allegations, *inter alia*, contended that the petitioner failed to explain each and every day delay to condone abnormal delay of 631 days. It is also contended that the petitioner also not prevented by sufficient grounds as he was given sufficient opportunity at every stage of the proceedings in the suit to contest the matter. The suit was filed one year prior to passing of decree i.e. in the year 2010, proceedings were pending before the trial court for a period more than one year. But, for failure to file written statement after waiting for a long time, the trial court passed the decree. The petitioner engaged Sri C.Vidyasagar Reddy and K. Venkateswarlu, Advocates, prior to engaging Sri L.Ayodya Ramaiah, Advocate, and thus he was given umpteen number of adjournments in filing the petition. As the written statement was not filed by the petitioner, the trial court passed conditional order and the petitioner even then had not filed written statement, ultimately he was set *ex parte*, thereafter the decree was passed in favour of the respondent herein and against the petitioner. The petitioner filed execution petition on 08.11.2012 to execute the decree. In the execution petition the petitioner tried to avoid receipt of notice. He engaged Sri Venkateswarlu, Advocate, to defend him in the execution petition, successfully obtaining several

adjournments, but no counter is filed in execution petition also, thereby opportunity to file counter by the petitioner was forfeited on 28.02.2013. Thus, at every stage, the petitioner was provided opportunity to contest in the court. But, without availing such opportunity afforded to him, avoided to prosecute the proceedings and now came up with this petition to condone abnormal delay of 631 days after long period. The plea of ignorance of law is not a ground and that the alleged failure of the counsel to give information is a bare lie and on such ground, the delay cannot be condoned. Even otherwise the petitioner being an armed reserve constable is expected to know the consequences, but he failed to take necessary steps, at every moment exhibiting sheer negligence, invented story of failure to inform about the date of adjournment by the counsel and finally prayed to dismiss the petition.

Considering rival contentions, perusing the material available on record the point that arise for consideration is:

Whether the petitioner was prevented by the cause which is beyond his reasonable control in filing a petition under Rule 13 of Order IX of CPC? If so, whether delay of 631 days in filing a petition under Rule 13 of Order IX of CPC be condoned?

IN Re.POINT:

A bare look at the contents of the affidavit filed in support of the petition, it is noticed that the petitioner engaged a counsel to defend the suit, he also admitted that the counsel obtained his signature on the typed papers while asking him to appear before the court personally whenever his presence is required, but did not file written statement and did not inform about the dates of

adjournments, thereby *ex parte* decree was passed by the trial court. As the petitioner is not aware about passing of decree *ex parte*, he kept quiet. But, only on receipt of notice in execution petition, he came to know about passing of *ex parte* decree against him and immediately engaged Sri Venkateswarlu, Advocate, to defend him in the execution proceedings.

Though the respondent denied the said contentions, it is an admitted fact that the petitioner engaged counsel to defend him in the suit by filing written statement. The Advocate allegedly promised to inform him to attend the court whenever requires. Still it is the duty of the petitioner to take care of judicial proceedings pending before the court. If for any reason Advocate failed to inform about the date of adjournments and necessity to file written statement, it is the failure on the part of Advocate to discharge his duties exhibiting negligence. In such case, the remedy available to the petitioner is to proceed against the counsel to take necessary action for negligence in prosecuting the proceedings, entrusted to him as the relationship between the 'client' and the 'advocate' is 'principal' and 'agent'. But alleged negligence on the part of Advocate in informing about the dates of adjournments and the necessity to file written statement by itself is not a ground to condone delay, since the petitioner being an armed reserve constable is expected to prosecute the proceedings with more diligence, as he is not a lay man.

It is the contention of the petitioner that he received notice in execution proceedings, later appeared through his Advocate on 21.06.2013, but did not file counter. The present petition before

the trial court was filed two months thereafter i.e. after failure to file counter before the court in execution proceedings, and after passing an order in execution petition, the present petition was filed to condone delay in filing a petition under Rule 13 of Order IX of CPC. Thus, engaging an Advocate, failure to file counter in execution proceedings even after receiving the notice in the execution proceedings, is sufficient to conclude that the petitioner is aware about passing of an *ex parte* decree, but he did not choose to file any application to condone the delay immediately on receipt of notice in the execution proceedings. The petitioner failed to explain the delay in filing petition from the date of receipt of notice or atleast after appearance before the court through the counsel on 21.06.2013 in the execution proceedings, but appears to have delayed deliberately in prosecuting the proceedings raising specific defence, obviously for different reasons.

The total conduct of the petitioner if taken, he was negligent at every stage of the proceedings. The *modus operandi* of the petitioner appears to be that engaging an Advocate, failing to file counter and finally not prosecuting the proceedings and filing petitions successively one after the other, whenever he find leisure to approach an Advocate. Thus the petitioner deliberately and intentionally delayed the proceedings at every stage, at his convenience filed the present petition, two months after receipt of notice in execution proceedings, that itself suffice to conclude that the petitioner intentionally avoided to prosecute the proceedings at every stage with an intention to create a ground to condone the delay and set aside the *ex parte* decree, deliberately. The person whose conduct is highly reprehensible is not entitled to

discretionary relief of the condonation of delay in filing petitions exercising power under Section 5 of the Limitation Act. Though he admittedly received a notice in execution proceedings, engaged an Advocate on 21.06.2013, as to why he did not take steps to file a petition under Section 5 of Limitation Act remained unexplained anywhere, since nothing prevented him to file application immediately after receipt of notice in execution proceedings to condone the delay.

In the absence of any explanation for delay more than two months after receipt of notice in execution proceedings, and appeared before the court through counsel on 21.06.2013 is a deliberate attempt made by the petitioner to drag the proceedings without sufficient cause inventing one or the other.

The court can exercise its discretion under Section 5 of Limitation Act only in favour of a person who is diligent, but not a person who is in slumber. The totality of conduct of the petitioner, if taken into consideration, more particularly, unexplained delay after receipt of notice in execution proceedings and appearance through the counsel, he is disentitled to discretionary relief of condonation of delay as he was not prevented by cause which is beyond his reasonable control in filing of application after receipt of notice in execution proceedings.

Undoubtedly, the courts cannot adopt pedantic approach in condonation of delay while construing the word "sufficient cause" liberally. But such liberal approach cannot be stretched to such extent to frustrate the very intention of the legislature giving aid to the person, who exhibited sheer negligence in prosecuting the

proceedings. However, it is clear from the law declared by the Apex Court that when a person is able to satisfy the court that he was prevented by sufficient cause, liberally construing the cause as sufficient, the court can condone delay affording reasonable opportunity to the parties to contest the suit.

Here the suit was filed in the year 2010 *ex parte* decree was passed after one year in view of contest by the petitioner engaging an Advocate, but failed to file written statement. In such case, such long delay of 7 years as on today on account of self negligence of the petitioner, the delay cannot be condoned, as the petitioner was not prevented by a cause which is beyond his reasonable control.

Sri Subba Rao Korrapati, learned counsel for the petitioner, while placing reliance on the Judgment of this court in **R. Krishna alias Kistaiah v. R.Bala Narasaiah (died) per LRs. And others**¹ contended that length of delay is not a matter, but the acceptability of delay on explanation is the only criteria. The law declared by this court is not in quarrel.

While deciding the application under Section 5 of the Limitation Act, length of the delay is irrelevant and at best the court has to consider as to whether the delay was explained that was prevented by sufficient cause, this court relied on earlier judgment of the Apex Court reported in **N.Balakrishnan v. M.Krishnamurthy**², **Collector, Land Acquisition, Anantnag and another v. Mst.Katiji and others**³, wherein the Apex court held

¹ 2014(2) ALT 634

² (1998) 7 SCC 123

³ AIR 1987 SC 1354

that the power to condone delay by enacting Section 5 of the Limitation Act, 1963 is to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the Legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which serves the ends of justice which is the life purpose for the existence of the institution of courts; substantial justice deserves to be performed as against technical considerations; and the courts should prefer to deliver justice on merits in preference to the approach which scuttles a decision on merits and also relied on the other judgment on the same lines.

Basing on the law declared by the Apex Court, this court concluded that the length of delay is not a matter. This law is not in dispute. But in the name of substantial justice, the court cannot jettison the substantial law of limitation, especially in cases where the Court concludes that there is no justification for the delay. In **Lanka Venkateswarlu (died) by L.Rs. -Vs- State of A.P. and others⁴**, the Apex Court held as follows:

“We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as “liberal approach”, justice oriented approach”, “substantial justice” cannot be employed to jettison the substantial law of limitation, especially in cases where the Court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this

⁴ AIR 2011 SC 1199

case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay under Section 5 of the Limitation act, the Courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections cannot and should not form the basis of exercising discretionary powers.”

In **P.K.Ramachandran v. State of Kerala and another**⁵, the Apex Court held as follows:

“Law of limitation may harshly affect a particular party, but it has to be applied with all its rigor when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds. The discretion exercised by the High Court was, thus, neither proper nor judicious. The order condoning the delay cannot be sustained.”

In **Srinivasa Book Depot, Book Sellers, Nizamabad and others V. Bank of India, Kumargally Branch, Nizamabad**⁶, this court held as follows:

“It is true that where public funds are involved, the Court should be liberal in condonation of delay. However, it is too difficult to generalize such a proposition and relieve the institutions from the responsibility and obligation to assign reasons. The question of there being liberal or other approach would arise if only there are certain reasons. If no reasons exist, it is too difficult to condone years of delay based

⁵ AIR 1998 SC 2276

⁶ 2003(1) ALD page 126

on the ground hat the affected party is an institution dealing with public funds. Equally important are the rights conferred upon citizens by law.

When the delay of 714 days was found not explained properly even where several factors relevant to the issue such as illness of the advocate, efforts made by the bank, etc., have been raised, it is too difficult to condone the delay of 787 days where such explanation does not exist at all."

In view of the law laid down by the Apex Court in in **Lanka Venkateswarlu (died) by L.Rs. V. State of A.P. and others** (4th supra), it is difficult to accept the proposition relied on by the counsel for the petitioner, as the petitioner failed to establish that he was prevented by sufficient cause much less the cause which is beyond his reasonable control to file a petition under Rule 13 of Order IX of CPC.

Learned counsel for the respondent placed reliance on **Pundlik Jalam Patil (dead) by LR. V. Executive Engineer, Jalgaon Medium Project and another**⁷ wherein the Apex court held as follows:

"....relaxation or extension of limitation in case of public authorities is permissible only in case of proved acts of fraud or collusion on the part of its officers or agents, otherwise the law of limitation is same for citizen and for governmental authorities. A feeble attempt by the counsel for respondent was made to suggest collusion and fraud but without any basis, therefore, is unacceptable.

Basically, the laws of limitation are founded on public policy. Statutes of limitation are sometimes described as "Statutes of peace". An unlimited and perpetual threat of limitation creates insecurity and uncertainty; some kind of limitation is essential for public order. The principle is based

⁷ (2008) 17 SCC 448

on the maxim '*interest reipublicae ut sit finis litium*' that is, the interest of the State requires that there should be end to litigation but at the same time laws of limitation are a means to ensure private justice suppressing fraud and perjury, quickening diligence and preventing oppression. The object for fixing time-limit for litigation is based on public policy fixing a lifespan for legal remedy for the purpose of general welfare. They are meant to see that the parties do not resort to dilatory tactics but avail their remedies promptly. Salmond in his *jurisprudence* states that the laws come to the assistance of the vigilant and not of the sleepy."

In view of the law declared by the Apex Court and observation made therein, it is clear that the law of limitation come to the aid of person who is vigilant and not in slumber.

In the present case, the petitioner was negligent in prosecuting proceedings. Even according to the allegations made in the affidavit filed along with the petition, he received notice much prior to 21.06.2013 and prosecuted the proceedings in execution petition engaging counsel for more than two months and after dismissal of the petition, leisurely approached the court filing a petition on 26.08.2013. Thus, almost after two months 07 days he filed the present petition though he is conscious of an *ex parte* decree passed against him for recovery of the amount. In such case, the unexplained delay from the date of receipt of notice in execution petition or atleast from the date of appearance through the counsel before the court in execution proceedings on 21.06.2013 till 26.08.2013 two months 07 days, thereby delay cannot be condoned.

It is true that a party is entitled to wait until the last day of limitation for filing an appeal. But when it allows limitation to expire and pleads sufficient cause for not filing the appeal earlier,

the sufficient cause must establish that because of some event or circumstance arising before limitation expired it was not possible to file the appeal within time. No event or circumstance arising after the expiry of limitation can constitute sufficient cause as held by the Apex Court in **Ajit Singh Thakur Singh v. State of Gujarat**⁸

Even in view of the Judgment of the Apex Court in **Ajit Singh Thakur Singh v. State of Gujarat** (8th supra), it is for him to explain what prevented the petitioner from filing the application immediately on receipt of notice in execution proceedings but conveniently pleaded that he is unaware of the steps to be taken in prosecuting execution proceedings. It is settled proposition of law that ignorance of law is no excuse, that apart the petitioner is an armed reserve constable and he is not supposed to plead ignorance of the procedures, more particularly, when he is engaged the counsel to defend him in the suit. In such case, it is difficult for me to accept the contention that the petitioner was prevented by sufficient cause, more particularly, during the period from 21.06.2013 to 26.08.2013 even the deliberate conduct of the petitioner in protracting the petition for one reason or the other and inventing the cause much less sufficient cause which prevented him in filing a petition, to condone delay, approached the court leisurely at his convenience would be disentitled him to get the delay condoned. Throwing blame on the counsel is easy, but proof of it is difficult. The affidavit of the petitioner's counsel was filed before the trial court even to accept the negligence of the counsel in informing the requirement to appear before the court

⁸ (1981) 1 SCC 495

etc. In those circumstances, the deliberate attempt made by the petitioner to protract the proceedings, but sufficiently for long time would not afford a ground to condone abnormal delay of 631 days in filing a petition.

The trial court, on close analysis of each and every fact including the conduct of the petitioner in prosecuting the proceedings at every stage, rightly concluded that the petitioner was not prevented by sufficient cause. Thus the order passed by the trial court is free from legal infirmities, which warrants no interference of this court while exercising power under Section 115 of CPC.

The power under Section 115 CPC can be exercised only in three circumstances, by calling for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears - a) to have exercised a jurisdiction not vested in it by law, or b) to have failed to exercise a jurisdiction so vested, or c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit. But the High Court shall not, under this section vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings, the High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

Thus, in view of limited jurisdiction of this Court under Section 115 of CPC, I am unable to reverse the order passed by the trial court as the petitioner failed to establish that the subordinate court has failed to exercise jurisdiction vested in it by law or failed to exercise jurisdiction so vested or acted in exercise of its jurisdiction illegally or with material irregularity.

In the entire grounds of revision, no such allegation was made to attract any of the requirements to interfere with the orders passed by the trial court exercising power under Section 115 of CPC. In such case, this court cannot interfere with the order under challenge exercising power under Section 115 of CPC. Therefore, I find no merits in the revision and it deserves to be dismissed.

In the result, the civil revision petition is dismissed confirming the order dated 21.04.2014 in I.A. No.1226 of 2013 in O.S. No.83 of 2010 passed by the Principal District Judge, Warangal. No costs.

Miscellaneous petitions, if any, pending in this civil revision petition shall stand closed.

M.SATYANARAYANA MURTHY, J

Date:19.06.2017
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