

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.3986 of 2011

ORDER :

The Debtor-respondent of the Creditor I.P.No.1 of 2009, who maintained I.A.No.130 of 2011 before the I-Additional Senior Civil Judge, Kakinada (for short, 'the lower Court'), under Section 5 of the Limitation Act, to condone the delay of 388 days in filing the application to set aside *ex parte* decree dated 28.10.2009 passed against him, maintained the revision impugning the order dated 04.07.2011.

2. Heard both sides.
3. The contentions in the grounds of revision vis-à-vis the oral submissions of the learned counsel for petitioner are that the lower Court should have seen that there is plausible explanation for the delay, that to be condoned to set aside the *ex parte* decree and, the lower Court's observation of the explanation is not acceptable and not reasonable, is unsustainable though required to adopt a liberal approach, for not a case of day-to-day explanation, for the cause assigned to the delay is undergoing of treatment to the cardiac problem and should have seen that the application be allowed from the explanation otherwise causing grave injustice and irreparable loss, hence to allow the revision by setting aside the impugned order.

4. Whereas, it is the contention of learned counsel for the respondents that the impugned order of the lower Court is on merits and no way requires interference.

5. Heard and perused the material on record.

6. The observations of the lower Court therefrom, after hearing both sides, is there is no medical record and there is no other proof of the petitioner is suffering from cardiac problem, much less taken any treatment and no body was examined, much less himself to substantiate the averments in dispute and his previous conduct is not fair and there are no bonafides in not availing opportunity in filing the petition and for no grounds to condone the delay.

7. The averments in support of the application to condone the delay are that on 18.09.2009 the insolvency petition is posted for cross-examination of PW.1 to be done by him and on that day he could not contact his advocate, thereby he was set *ex parte* and later on 28.10.2009 *ex parte* decree was passed and in fact, he was suffering from cardiac problem and due to fear of going operation, he opted for Homeopathi treatment, where Doctors advised not to take painful work and avoid oil and other intake to reduce weight with limited food, as such he could not contact the advocate and came to only recently from the letter of the Official Receiver to hand over possession about the *ex parte* decree and there are no willful latches. The counter filed by the insolvency petitioner-creditor is while denying the said averments with the continuation even previously the

petitioner was set *ex parte* and filed set aside *ex parte* petition and the same was allowed and he did not evince interest and did not avail opportunity and did not choose to cross-examine him despite opportunities and it is nothing but delay tactics as the Official Receiver initiated the action to take possession of the properties so as to administer and even taken time to settle the matter, he failed to do so, and came with the petition with false versions and there are no grounds to condone the delay.

8. A perusal of the record shows no affidavit of the so-called doctor even filed through him he is undergoing treatment for the alleged cardiac problem and he did not mention the period of treatment. He did not even mention that in what way disabled even to contact the advocate, much less to seek for adjournment on that ground by filing affidavit. There is no explanation from him for consideration of the earlier petition filed and taken time towards to settle the matter and failed to avail the opportunities. His conduct is not worthy of fairness as concluded by the lower Court. In fact, he was set *ex parte* in the main petition and he filed I.A.No.889 of 2009 to set aside the *ex parte* order and that was allowed by the insolvency Court and again he remained *ex parte* and again failed to cross-examine PW.1 despite opportunities and for that also he filed I.A.No.1096 of 2009 and the same was even allowed subject to payment of costs of Rs.250/- on or before 24.10.2009 and for cross-examination of PW.1, he did not comply, he did not avail the

opportunities, he did not assign any reason and he did not even disclose the same in his affidavit petition. It is in fact for non-compliance once dismissed for default, he did not even chose to restore that, much less within reasonable time. It is hardly believable, without his knowledge, the applications were filed by the counsel and not even the case of those are not supported by his affidavits. It is a clear case of non-disclosure of the material facts knowingly and deserves no consideration for not entitled to any equitable or discretionary relief. No doubt, the approach to be adopted is pragmatic and liberal. Even then there are no just grounds to condone the delay. As rightly concluded by the lower Court in saying despite opportunities there is no fairness on his part in not availing even filing petition after petition without fairness. Hence, the impugned order of the lower Court no way requires interference.

9. Accordingly, the revision is dismissed.

10. Miscellaneous petitions pending, if any, shall stand closed. No costs.

Dr. B. SIVA SANKARA RAO, J

Dt: 20-01-2017

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