

THE HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

CIVIL REVISION PETITION No. 587 of 2017

ORDER:

1) Aggrieved by the order, dated 26.12.2016, passed in I.A.No.222 of 2014 in O.S.No.83 of 2013 on the file of the Junior Civil Judge, Vayalpad, wherein an application filed under Section 5 of Limitation Act to condone the delay of 119 days in filing an application under Order IX Rule 13 of C.P.C. was dismissed, the present Civil Revision Petition is filed under Article 227 of the Constitution of India.

2) The facts in issue are as under:

Respondent Nos.1 to 3 herein, filed O.S.No.83 of 2013 to pass a preliminary decree for the division of plaintiff's 8/11th share in the land admeasuring Ac.0.33 cents along with tamarind trees. An exparte preliminary decree came to be passed on 11.11.2013. On coming to know about the same, the petitioner herein, who is the defendant in the suit filed I.A.No.222 of 2014 to condone the delay in filing an application under Order IX Rule 13 of C.P.C.

3) The averments in the affidavit filed in support of the petition would show that after receiving Court summons, the petitioner engaged Sri K.Masthan Vali, Advocate, to appear and defend her case. Due to kidney problem, the advocate was hospitalized for 10 months hence no written statement was filed within the time prescribed. Subsequently, an exparte decree came to be passed on

11.11.2013. Recently, the counsel for the petitioner returned from Bangalore after taking treatment and when she contacted him, it was informed that a decree has been passed. Immediately, thereafter, she filed an application under Order IX Rule 13 C.P.C. along with an application to condone the delay.

4) Plaintiff filed counter stating that the present petition came to be filed only to delay the proceedings. It is stated that there is abnormal delay in filing the petition and that the petitioner failed to explain day today delay in filing the petition.

5) After considering the rival submissions made, the trial Court dismissed the said petition. Challenging the same the present revision is filed.

6) Learned counsel for the petitioner mainly submits that the delay in filing the application to set aside ex parte decree petition is neither wilful nor wanton. He further submits that the counsel engaged by the petitioner could not inform the petitioner about the progress of the case and also the ex parte decree as he was hospitalized due to kidney failure. He also submits that the counsel for the petitioner took treatment in M.S.Ramaiah Hospital, Bangalore, for a period of ten months and thereafter he died.

7) No representation on behalf of the respondents, inspite of service of notice.

8) In *State of Bihar and others v. Kameshwar Prasad Singh and another*¹ the Apex Court held as under:

“11. Power to condone the delay in approaching the Court has been conferred upon the Courts to enable them to do substantial justice to parties by disposing of matter on merits. This court in *Collector, Land Acquisition, Anantnag v. Mst. Katiji*² held that the expression ‘sufficient cause’ employed by the legislature in the Limitation Act is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life purpose for the existence of the institution of Courts. It was further observed that a liberal approach is adopted on principle as it is realised that:

- 1) Ordinarily a litigant does not stand to benefit by lodging an appeal late.
- 2) Refusing to condone delay can result in meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
- 3) ‘Every day’s delay must be explained’ does not mean that a pedantic approach should be made. Why not every hour’s delay, every second’s delay? The doctrine must be applied in a rational common sense pragmatic manner.
- 4) When substantial justice and technical considerations are pitted against each other,

¹ (2000) 9 SCC 94

² (1987) ILLJ, 500 SC

cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of *mala fides*. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6) It must be grasped that judicial is inspected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.”

9) In [State of Nagaland v. Lipok Ao and others](#)³ the Apex Court held as under:

“Proof by sufficient cause is a condition precedent for exercise of the extraordinary discretion vested in the court. What counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. What constitutes sufficient cause cannot be laid down by hard-and-fast rule section.”

10) From the judgments of the Apex Court referred to above, it is clear that delay can be condoned if the circumstances of the case indicate that meritorious matter is being thrown out and the cause of justice being defeated, if the delay is not condoned. The Apex Court has categorically held that even if the delay is condoned, the highest that can happen is that a cause would be decided on merits, after hearing the parties.

³ (2005) 3 SCJ 558

11) In the instant case, the suit is for partition. Substantial rights of the parties are involved in the property to be partitioned. As seen from the record the delay in filing the application was due to the counsel for the petitioner falling sick and thereafter being shifted to M.S.Ramaiah Hospital, Bangalore, where he took treatment for a period of 10 months. As per the averments in the affidavit, the counsel, who was suffering with kidney problem, died. Therefore, the seriousness of the ailment can be inferred. In view of the judgments referred to above and taking into consideration the facts in issue, and the nature of suit, the impugned order is liable to be *set aside* and the delay in filing the petition under Order IX Rule 13 of C.P.C. can be condoned.

12) Accordingly, the Civil Revision Petition is allowed. There shall be no order as to costs. As a sequel thereto, Miscellaneous Petitions pending if any, shall stand closed.

JUSTICE C. PRAVEEN KUMAR

07.04.2017

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