

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.861 of 2018

ORDER:

This Civil Revision Petition, under Section 115 of the Code of Civil Procedure, 1908 ('the Code', for brevity), by the unsuccessful defendant is directed against the order, dated 04.01.2018, of the learned I Additional Junior Civil Judge, Ongole, passed in IA.no.329 of 2014 in OS.no.218 of 2013 filed under Section 5 of the Indian Limitation Act, 1963, read with Sections 94(e) & 151 of the Code requesting to condone the delay of 127 days in filing the application under Order IX Rule 13 of the Code for setting aside the *ex parte* decree, dated 31.01.2014 passed in the aforementioned suit.

2. I have heard the submissions of *Sri J. Seshagiri Rao*, the learned counsel appearing for the revision petitioner/defendant ('the defendant, for brevity). Despite granting sufficient opportunities, no submissions are made on behalf of the respondent-plaintiff ('the plaintiff', for brevity). I have perused the material record including the revision petition and the counter of the plaintiff.

3. The case of the defendant, in brief, is as follows:

The suit is filed for recovery of arrears of rent in a sum of Rs.28,000/- from the defendant and his eviction from the suit schedule property. However, decree was fraudulently obtained *ex parte* on 31.01.2014. The plaintiff filed E.P.No.70 of 2014 for delivery of the schedule property and obtained paper delivery, on 14.06.2014, in the absence of the defendant. Notices were exchanged prior to the institution of the suit. In the reply notice, dated 19.02.2013, the defendant categorically stated that he is an adopted son of Thatha Yathi Raja Valli Thayaramma and his name is Thatha Venkata Surya Prakasa Rao. He also informed about his title and possession over the schedule

property and the entering of his name in the municipal records in respect of the schedule property besides the sequence of events and the registered documents executed by the said Thayaramma in favour of this defendant and that there is no landlord and tenant relationship between the plaintiff and the defendant. In spite of the said facts, the plaintiff intentionally filed the suit showing the wrong surname as the surname of the defendant and obtained the *ex parte* decree. After the exchange of notices, this defendant placed the matter about the wrong claim being made by the plaintiff, before the elders. The elders assured that the plaintiff would not proceed further as he was made aware of the facts through the averments in the reply notice. Therefore, the defendant kept quiet without observing the movements of the plaintiff. In the circumstances, the suit is not maintainable. However, a decree was obtained mischievously. In the absence of the defendant, the Court Amin recorded delivery proceedings; the EP was posted to 17.07.2014 for recording delivery. And, if the delivery is to be recorded, this defendant suffers irreparable loss. He has got good case to succeed in the suit. As per advice, he filed the petition to set aside the *ex parte* decree. Since delay had occasioned in seeking to set aside the *ex parte* decree, the present petition is filed for condonation of the said delay. The delay had occasioned due to lack of knowledge. The delay is neither intentional nor due to laches on the part of the defendant. If the delay is not condoned the defendant suffers serious loss.

4. The averments in the counter and the case of the plaintiff as could be culled out from the material record, in brief, are as follows:

The material allegations in the affidavit of the defendant are false. The allegations that he is an adopted son of Thayaramma and that in the reply notice he stated all the facts and placed the matter before the elders and that the elders stated as alleged in the affidavit and that, therefore, he kept quiet without observing the movements of the plaintiff and that he had no

knowledge about the suit proceedings and that the plaintiff mischievously obtained the *ex parte* decree by showing the wrong surname etcetera are all false. The allegation that delivery obtained in the absence of the defendant is a paper delivery is also false. All the said allegations are invented. The decree & judgment and the delivery proceedings are valid. The EP was posted to 18.07.2014 for recording delivery. The defendant wantonly avoided to receive the suit summons sought to be served upon him. Hence, a paper publication was ordered and he remained *ex parte* without entering appearance. Hence, the suit was decreed *ex parte*. The refusal of the defendant to receive the suit summons is itself doubtful in view of the fact that he received a legal notice wherein the claim of the plaintiff is clearly stated. It is not correct to say that the delay is not intentional and that there are no laches on the part of the defendant. Once property is delivered, recording of delivery is automatic. There are no grounds to condone the delay.

5. At the time of enquiry, no oral and documentary evidence was adduced on either side. On merits, the trial Court had dismissed the petition of the defendant. Therefore, he is before this Court.

6. Now the points for determination are – Whether the revision petitioner/ defendant had made out valid and sufficient grounds and had shown sufficient cause for condonation of delay of 127 days in seeking to set aside the *ex parte* decree and judgment, dated 31.01.2014, in OS.no.218 of 2013 on the file of the Court of the learned I Additional Junior Civil Judge, Ongole? And, if so, whether the order impugned in this revision is unsustainable under facts and in law and is liable to be set aside?

7. POINT:

7.1 The cases of the parties and the facts that led to the filing of this revision petition by the defendant are already stated supra, in detail. Learned

counsel for the defendant reiterated the case of the defendant and submitted as follows: 'Rights related to valuable immovable property are involved. In the plaint the defendant's description was intentionally wrongly shown. The trial Court ordered service of summons by substituted service, that is, by publication in a newspaper. The said order indicates that the trial Court is also of the view that there is no service of summons or refusal of summons by the defendant. This Court is having wide discretion in matters of condonation of delay. In view of the valid explanation offered by the defendant, the trial Court ought to have condoned the delay and ought to have proceeded to set *aside* the *ex parte* decree by liberally exercising the discretion. No reasons much less valid reasons are assigned in the impugned order. The Court below went on the premise that the summonses were refused though in-fact the defendant was set *ex parte* after the publication of notice in newspaper but not on the ground that the summons sought to be served were refused.'

7.2 I have bestowed my attention to the facts and the submissions. I have given earnest consideration to the submissions. It is apt to now refer to 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*<sup>1</sup>]. 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.’

7.3 On a plain reading of the defendant’s affidavit, the contents of which are already stated supra, and on consideration of the submissions made, this Court is satisfied that there is sufficient explanation for non appearance of the defendant before the trial Court and also as regards lack of knowledge of the suit and the *ex parte* decree passed in the suit. It is a matter of record that the defendant was not set *ex parte* after the summons sent were returned with

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<sup>1</sup> AIR 2011 SUPREME COURT 1150

an endorsement of 'refusal'; but the defendant was set *ex parte* after a publication of the notice of the suit was made in a newspaper. Therefore, the contention raised before the trial Court that the defendant refused to receive the summonses offered to be served upon him needs no countenance more particularly when the defendant is claiming that he is an adopted son and that his surname is Thatha and not Nallamalli as mentioned in the cause title of the plaint and that his surname as shown in the plaint is wrong. Further, as rightly urged on behalf of the defendant, the defendant is making a rival claim in respect of valuable immovable property involved in the suit by placing reliance on his adoption as well as certain registered documents. Therefore, it appears that valuable rights with regard to immovable property of considerable value are subject matter of the *lis*. Having regard to the fact that this Court is satisfied that sufficient cause is shown for condonation of delay, and as it appears that the delay cannot be said to be deliberate and unjustified in the facts and circumstances of the case, this Court finds that the delay can be condoned and the defendant can be given an opportunity to have his cause decided on merits as such a course sub-serves the ends of justice.

7.4 Viewed thus, this Court holds that the defendant's request for condonation of delay that had occasioned in seeking to set aside the *ex parte* decree merits consideration and that the order impugned, which is unsustainable, brooks interference.

8. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. Consequently, I.A.No.329 of 2014 in O.S.No.218 of 2013 on the file of the Court of the learned I Additional Junior Civil Judge, Ongole, is allowed. The trial Court shall now take up the interlocutory application filed by the defendant seeking to set aside the *ex parte* decree and dispose of the same on merits and in strict accordance with the procedure established by law,

however, after giving an opportunity to the plaintiff to file counter, if any, and if not yet filed. The trial Court shall endeavour to dispose of the afore-stated I.A within a period of one (01) month from the date of receipt of a copy of this order.

There shall be no order as to costs.

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

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JUSTICE M. SEETHARAMA MURTI

27.07.2018  
Vjl

