

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

C.R.P.No.4365 of 2011

ORDER

This revision under Article 227 of the Constitution of India is filed challenging the order dated 04.07.2011 passed in I.A.No.525 of 2010 in O.S.No.6292 of 2006 by the VII Junior Civil Judge, City Civil Court, Hyderabad, condoning the delay of 639 days in filing an application under Order 9 Rule 13 of C.P.C.

2. The respondent/defendant filed a petition under Section 5 of Limitation Act, to condone the delay of 639 days in filing the application under Order 9 Rule 13 of CPC, before the trial Court, alleging that he received summons in E.P.No.221 of 2009 filed for execution of decree passed in O.S.No.6262 of 2006 on the file of VII Junior Civil Judge, City Civil Court, Hyderabad and immediately, he engaged a counsel and instructed him to appear on his behalf in the said execution petition. The main contention of the respondent is that he has not received any papers in the E.P., and upon enquiry, he came to know that the Court was pleased to pass an *ex parte* decree in O.S.No.6292 of 2006 without serving any notice on him. His specific contention is that he is a resident of Calcutta and as he was suffering from various ailments, he underwent treatment there for a sufficiently long time and in the absence of service of summons in the suit, the decree passed by the trial Court is liable to be set aside and that he was prevented by sufficient cause from filing an application under Order 9 Rule 13 of C.P.C., and prayed to condone the delay in filing the petition under Order 9 Rule 13 of C.P.C., to set aside the *ex parte* decree passed against him.

3. The petitioner/plaintiff, respondent in I.A., filed counter denying the material allegations *inter alia* contending that the notice was served on the respondent, petitioner herein, on 04.04.2007 by intimating the next date of hearing as 05.07.2007 in O.S.No.6292 of 2006 and also to his counsel, by name, Dr. Dwarakanath Sil, who in turn acknowledged the receipt of notice on 09.04.2007 and even after acquiring knowledge about the pendency of the suit, the petitioner failed to appear before the Court and at the stage of execution proceedings, the petitioner cannot seek condonation of delay in filing a petition to set aside the *ex parte* decree under Order 9 Rule 13 of C.P.C., and prayed to dismiss the petition.

4. The trial Court, upon hearing argument of both the counsel, allowed the petition condoning the delay of 639 days in filing the application on payment of costs of Rs.1,000/- having concluded that there was a sufficient cause which prevented the respondent from appearing before the Court i.e., no summons were served in the suit, and the cause shown by him is beyond his reasonable control.

5. Aggrieved by the order passed by the trial Court, the petitioner/plaintiff preferred this revision on various grounds.

6. The main contention of petitioner before the Court is that there are no sufficient reasons to condone the abnormal delay of 639 days in filing the petition under Order 9 Rule 13 of C.P.C., and the trial Court has not taken into consideration the notice served not only on the respondent but also on the counsel for the respondent, who issued a reply to the legal notice prior to institution of the suit

attributing knowledge to the respondent and committed an error in condoning the delay.

7. It is also contended by the petitioner that the bunch of medical record produced before the Court does not disclose about the exact health condition of the respondent at the relevant point of time and that the finding of the trial Court that the respondent was prevented from sufficient cause in appearing before the Court is erroneous and the Court is not expected to pass the order on displaced sympathy. Therefore, the trial Court has committed error in condoning the delay and prayed to set aside the order passed by the trial Court.

8. During hearing, the counsel for petitioner would draw the attention of this Court to the summons sent to the respondent in the suit, which was returned with an endorsement 'entered on' and when notice was sent by registered post to a correct address, the Court shall draw a presumption under Section 27 of General Clauses Act and under Section 114(f) of Indian Evidence Act that the notice is deemed to have been served on the respondent. He placed reliance on the judgment of the Apex Court in **N. Paraeswaran Unni V. G. Kannan and another**¹ in support of his contention. He also placed reliance on the judgment of the Apex Court in **Basant Singh and another V. Roman Catholic Misson**² and in **Parimal V. Veena Alias Bharti**³. Finally, he contended that in view of proviso to Order 9 Rule 13 of C.P.C., when the respondent had knowledge about the pendency of the proceedings in view of the notice served not only to

¹ 2017(5) SCC 737

² AIR 2002 SC 3557

³ (2011) 3 SCC 545

him but also to his counsel, it would suffice to conclude that the respondent had knowledge about the pendency of the suit and the date of adjournment, but he did not appear before the Court obviously for different reasons and therefore, the delay cannot be condoned in filing a petition to set aside the *ex parte* decree.

9. Whereas, the counsel for the respondent Sri Ch. Pushyam Kiran, has supported the order in all respects while contending that when the respondent was suffering from serious ailments and he underwent treatment at Calcutta being native of Calcutta, which prevented him from filing a petition and such sufferance is sufficient cause within the ambit of Section 5 of Limitation Act and such cause shall be construed liberally to achieve the real object of rendering justice to the parties. He placed reliance on the judgment of the Apex Court in **State of Karnataka v. Y. Moideen Kunhi (dead) by LRs., and others⁴**; and **Perumon Bhagvathy Devaswom, Perinadu Village V Bhargavi Amma (dead) by LRs and others⁵** in support of his contentions.

10. In view of the rival contentions, the point that arises for consideration is;

“ whether the respondent is prevented by sufficient cause which is beyond reasonable control from appearing before the trial Court and if so, whether the delay of 639 days in filing a petition under Order 9 Rule 13 of C.P.C. be condoned ?

⁴ AIR 2009 SC 2577

⁵ (2008) 8 SCC 321

11. **POINT:**

Order 9 Rule 13 of C.P.C., deals with the power of the Court to set aside the *ex parte* decree passed against the defendant. According to order 9 Rule 13 of C.P.C, in any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. The second proviso thereto further says that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

12. Taking advantage of second proviso to Order 9 Rule 13 of C.P.C., the counsel for petitioner contended that when the respondent had knowledge about the date of adjournment in view of legal notice sent by the counsel for petitioner to the counsel for the respondent, who issued a reply to the notice prior to filing of the suit, is sufficient and knowledge is attributable to the respondent regarding the date of adjournment in the pending suit. To substantiate his contention, he would draw the attention of this Court

to the notice dated 31.03.2007 addressed to Mr. Dwarka Nath Sil, Advocate, 36, Mukkaram Babu Street, Kolkotta, where-under the date of adjournment was intimated to the counsel, who issued a reply to the notice prior to filing of the suit, as 05.04.2007, and another notice to Mr.Mahender Kumar Roongta, the respondent herein, was addressed on 18.10.2006 and 20.06.2007 intimating the date of adjournment of the suit in O.S.No.6292 of 2006 as 19.07.2007, but no acknowledgment was filed except the postal receipt dated 20.06.2007. This letter was addressed to the respondent as resident of House No.96, Tollygunge Circular Road, Kolkatta. But no acknowledgment is filed to prove the receipt of notice by the respondent. Based on the notice dated 20.06.2007 allegedly addressed to the respondent, knowledge is attributed about the date of adjournment, but in the absence of any acknowledgment, it is difficult to attribute knowledge to the respondent about date of adjournment. Similarly, the notice sent to the counsel, who issued a reply notice prior to filing of the suit, is also not sufficient to attribute knowledge to the respondent since he was not engaged as counsel in the suit, but engaged only for issue of reply. But, a copy of the notice dated 31.03.2007 was marked to Mahender Kumar Roongta and receipt of the same was acknowledged on 04.04.2007. Even as per the contents of the notice dated 31.03.2017, a copy was marked to the respondent intimating about the date of adjournment as 05.04.2007 and the said notice was acknowledged on 04.04.2007, just one day before the date of adjournment, assuming that the notice was served. As per the second proviso to Order 9 Rule 13 of CPC, the Court shall not

set aside the decree passed *ex parte* merely on the ground that there was an irregularity in the service of summons if it is satisfied that the defendant has noticed the date of hearing and had sufficient time to appear before the Court to answer the plaint. Therefore, to deny the relief to set aside the *ex parte* decree, the petitioner has to satisfy that the respondent noticed the date of adjournment and had sufficient time to appear and answer the plaintiff's claim before the Court. When the receipt of notice was acknowledged one day prior to the date of adjournment i.e., 04.04.2007, while residing at Calcutta, it is difficult for the respondent to appear before the Court in pursuance of said notice about the date of adjournment as the date of receipt of notice and the date of adjournment was intervened by only one day. Therefore, based on the second proviso to Order 9 Rule 13 of CPC, the petitioner failed to satisfy the second requirement, but such proviso is applicable only to decide an application under Order 9 Rule 13 of CPC, but for not deciding a petition filed under Section 5 of Limitation Act.

13. The present petition is filed for condonation of delay of 639 days in filing a petition, but the respondent is not required to file such application since no summons in the suit were served under Order 5 of CPC and according to Article 123 of the Limitation Act, to set aside a decree passed *ex parte* or to rehear an appeal decreed or heard *ex parte*, the limitation is 30 days, commencing from the date of decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree. According to the allegations made in the affidavit filed along with the petition by the

respondent before the trial Court, he had knowledge about the passing of a decree *ex parte* on the date of receipt of summons in execution petition and the limitation starts from the date of receipt of summons. However, the respondent filed this petition within 30 days from the date of receipt of summons in the execution petition to set aside the *ex parte* decree along with the petition to condone the delay on the ground that no summons were served and he had no time sufficient to appear before the Court to answer the plaint and thereby he was prevented by a cause which is beyond his reasonable control and sought for condonation of delay of 639 days. The trial Court recorded a finding that the petitioner was prevented by sufficient cause by exercising discretionary power conferred on it by Section 5 of Limitation Act. But the counsel for the petitioner contended that the exercise of discretionary power by the trial Court is irregular and when the notice was deemed to have been served on the respondent, the delay cannot be condoned and placed reliance on the judgments referred supra. But the judgment of the Apex Court in **N. Paraeswaran Unni's** case, referred supra, has no application to draw a presumption under Section 27 of the General Clauses Act or Section 114 (f) of Indian Evidence Act since notice was not refused but returned with endorsement 'unclaimed'. But, it is the consistent case of the respondent that he was undergoing treatment and the question of intimation about the registered cover addressed to him personally would not arise and therefore, presumption under Section 27 of General Clauses Act is rebutted by preponderance of probabilities.

14. Learned counsel for the petitioner further relied upon the judgment of the Apex Court in **Basant Singh's** case, referred supra i.e., under Order 9 Rule 13 of C.P.C., and in view of presumption under Section 114-A of Evidence Act and under Section 27 of General clauses Act, notice is deemed to have been served, but these two judgments have no application to the present facts of the case.

15. Whereas the counsel for petitioner placed reliance on the three judgments referred supra. In all the three judgments, the Apex Court held that sufficient cause has to be interpreted liberally without adopting hidebound and pedantic approach, to do substantial justice to the parties before the Court.

16. In **K. Subbarayudu and others V. Special Deputy Collector**⁶, the Apex Court considered the scope. The relevant facts are that a notification under Section 4(1) of Land Acquisition Act, 1894 was issued on 01.10.1990. An award was passed fixing the compensation. The land was taken into possession. A reference under Section 18 of the Act was made against the compensation awarded, to Senior Civil Judge who enhanced the compensation. Dissatisfied with this, an appeal was preferred to High Court at Hyderabad with delay of 3671 days. High Court dismissed the appeal on ground of 'no sufficient cause for delay'. Hence, the present special leave petition. P.11-The term 'sufficient cause' is to receive liberal construction so as to advance substantial justice. When no negligence, inaction or want of bonafides is attributable to

⁶ 2017 (12) SCC 840

the appellants, the Court should adopt a justice-oriented approach in condoning the delay. In *State of Nagaland v. Lipok Ao*, it was held that Section 5 of Limitation Act contemplates that the Court has to go in the position of the person concerned and to find out if delay can be said to have resulted from the cause which he had adduced and whether the cause can be recoded in the peculiar circumstances of the case as sufficient. In *Dhiraj Singh V. State of Haryana*, it was held that substantive rights of appellants should not be allowed to be defeated on technical grounds by taking a hyper technical view of self-imposed limitations. The true guide is whether the litigant acted with due diligence.

In **Shakuntala Devi Jain v. Kuntal Kumari**⁷, the Apex Court held that Section 5 gives the Court a discretion in respect of jurisdiction to be exercised in the way in which the judicial power and discretion ought to be exercised upon principles which are well understood. The words sufficient cause receives a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bonafides is imputable to the appellant.

In **Balakrishnan V. M. Krishnamurthy**⁸, the Apex Court held that rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. Length of delay is no matter, acceptability of explanation is the only criterion”.

⁷ AIR 1969 SC 575

⁸ 1978 (7) SCC 123

In **Ram Nath Sao V. Gobardhan Sao**⁹ the Apex Court held that what would constitute 'sufficient cause' would depend on facts and circumstances of each case. There cannot be straight jacket formula for accepting/rejecting an explanation furnished for delay caused in taking steps. Acceptance of explanation should be the rule and refusal an exception more so when no negligence, inaction or want of bonafides can be imputed to defaulting party.

In **P. Buchamma v. B. Yadagiri**¹⁰, this Court held that the suit filed by the respondent for specific performance of alleged agreement of sale. Defendant filed application under Order 9 Rule 13 of CPC to set aside ex-parte decree by condoning delay of 189 days. Trial Court dismissed on the ground that petitioner/defendant failed to file separate application one under Section 5 and other under Order 9 Rule 13 of C.P.C. It was held by this Court that Court below ought to have been more liberal in its approach and should have considered the fact that landed property rights were at stake. Petitioner claimed that he had failed to take necessary steps on account of old age and age related ailments. He is a senior citizen aged over 66 years. It is a settled principle of law that when valuable immovable property rights are involved, the Court should ordinarily afford a hearing to both parties rather than taking a decision by hearing one side. Hence, civil revision petition allowed and delay condoned.

17. In view of the law declared by the Apex Court in the recent judgments and considering the cause shown by the petitioner

⁹ 2002(3) SCC 195

¹⁰ 2017(3) ALD 583

liberally without adopting pedantic approach, the trial Court condoned the delay, though not required in view of Article 123 of Limitation Act and the order passed by the trial Court is purely discretionary in nature and this Court, while exercising jurisdiction under Article 227 of the Constitution of India, cannot interfere with such discretionary order passed by the trial Court to do complete justice to the parties before it. Hence, I find no legal infirmity warranting interference by this Court in the order passed by the trial Court. The revision is devoid of merits and deserves to be dismissed.

18. In the result, the Civil Revision Petition is dismissed. No order as to costs. Miscellaneous petitions, if any, pending in this revision shall stand dismissed.



M. SATYANARAYANA MURTHY, J

6th February, 2018

sj