

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

Civil Revision Petition No.339 of 2018

ORDER:-

This Revision is filed challenging the order dated 11.12.2017 in I.A.No.33 of 2015 in O.S.No.2 of 2013 of the Junior Civil Judge at Thorrur.

2. The petitioner herein is the defendant in the suit.
3. The respondent/plaintiff filed the said suit against the petitioner for perpetual injunction restraining the petitioner from interfering with his alleged possession and enjoyment of the suit schedule property.
4. Summons in the suit were served on the petitioner and he also engaged a Counsel but he did not file written statement.
5. So he was set *ex parte* and an *ex parte* decree was passed on 30.04.2013.
6. On 07.11.2014, 556 days later, the petitioner filed I.A.No.33 of 2015 under Section 5 of the Limitation Act to condone delay of 556 days in filing the application under Order IX Rule 9 C.P.C.
7. In the affidavit filed in support of the said application, he stated that he had gone to Republic of South Africa on 13.09.2013 and returned to India on 20.10.2014 and then came to know about the *ex parte* decree in the suit. He stated that he went in search of his job abroad and so could not meet his Counsel, and the Counsel therefore could not file his written statement.

8. Counter affidavit was filed by the respondent opposing the said application. He contended that the petitioner did not show sufficient cause for condonation of the delay and the reason assigned by the petitioner cannot be accepted. It is pointed out that when the suit was decreed on 30.04.2013 and the petitioner left for Republic of South Africa on 13.09.2013 and the petitioner had knowledge of the suit before it was decreed *ex parte* on 30.04.2013, and so he cannot wait till November, 2014 to file the Interlocutory Application.

9. By Order dated 11.12.2017, the Court below dismissed the said application. It observed that the *ex parte* decree was passed in the suit on 30.04.2013 on which date the petitioner was very much available in India and the visiting VISA given to the petitioner was only on 14.08.2013 to visit Republic of South Africa for 20 days only. Therefore, the story set up by the petitioner is unbelievable. It consequently refused to condone the delay and dismissed the I.A.

10. Challenging the same, this Revision is filed.

11. Counsel for the petitioner contended that the petitioner had gone to South Africa for his employment and so he could not file Written Statement by contacting his Counsel and since valuable rights of property are involved, the Court below should have condoned the delay in filing the application to set aside the *ex parte* decree. He also placed reliance on the judgment of the

Supreme Court in **ESHA BHATTACHARJEE v. RAGHUNATHPUR NAFAR ACADEMY**¹.

12. From the facts narrated above, it is clear that the petitioner had received summons in the suit filed by the respondent against him and even engaged a Counsel but did not file Written Statement within 30 days. The Court below therefore set him *ex parte* and passed *ex parte* decree on 30.04.2013. As on the date of passing of *ex parte* decree, the petitioner was very much resident in India. But there is no explanation forthcoming from the petitioner why he did not file Written Statement and remained *ex parte* in the suit. There is also no explanation from the petitioner what he did between 30.04.2013 and 13.09.2013 when he allegedly went to South Africa for employment purposes. Even assuming that the petitioner was in South Africa and returned to India only on 20.10.2014 nothing prevented the petitioner from talking to his Counsel from telephone, skype etc., or corresponding with the Advocate by post/e-mail and taking steps to get the *ex parte* decree set aside.

13. In **N.BALAKRISHNAN v. M.KRISHNAMURTHY** ², the Supreme Court held that for condonation of delay, length of the delay is not important and acceptability of explanation is only the criterion. Though it observed that the primary function of the Court is to adjudicate the dispute between parties and to advance substantial justice, it observed that rules of limitation have to be respected and they are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. Unending period

¹ (2013) 12 SCC 649

² AIR 1998 S.C., 3222

of launching a remedy may lead to unending uncertainty and consequential anarchy and thus the law of limitation is founded on public policy. It observed that there is no presumption that delay in approaching the Court is always deliberate and if the explanation does not smack of *mala fides* or it is not put forth as part of a dilatory strategy, Court must show utmost consideration to the suitor.

14. Similar view has been taken in **Esha Bhattacharjee's case (1 supra)** also. The Court summed up the principles in paras 21 and 22 as under:-

21. From the aforesaid authorities the principles that can broadly be culled out are:

i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

ii) The terms “sufficient cause” should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact- situation.

iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

22. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are: -

a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

d) The increasing tendency to perceive delay as a non- serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters.

15. Therefore, it ultimately turns on the facts of each case as to whether delay in seeking a remedy requires condonation or not.

The conduct, behaviour and attitude of a party relating to his inaction or negligence are relevant factors.

16. In my considered opinion, since the petitioner, though very much available in India before the suit was decreed *ex parte* did nothing to contest the suit or to have the *ex parte* decree set aside, there has been gross negligence on the part of the petitioner and this does not warrant the condonation of inordinate delay of 556 days in filing the application under Order IX Rule 13 C.P.C.

17. I therefore do not find any error of jurisdiction in the Order passed by the Court below warranting interference by this Court under Article 227 of the Constitution of India. Therefore, the Civil Revision Petition fails and it is dismissed. No order as to costs.

Consequently, miscellaneous petitions if any pending in the Civil Revision Petition shall stand dismissed.

M.S.Ramachandra Rao, J

31st July, 2019

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