

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION Nos.568 and 575 of 2019

COMMON ORDER :

These two Revisions arise between the same parties out of the same suit and so they are being disposed of by this common order.

2. In C.R.P.No.568 of 2019, notice to 1st respondent has been served. Notice sent to 2nd respondent is returned with an endorsement “unclaimed”.

3. In C.R.P.No.575 of 2019, notice sent to 1st respondent returned as “unclaimed” and 2nd respondent is served.

4. Since it is settled law if notice is returned as ‘unclaimed’, it is deemed service, both respondents are deemed to be served in both the cases.

5. Petitioners in both the Revisions are plaintiffs in the suit O.S.No.110 of 2012 on the file of the Additional Senior Civil Judge at Karimnagar.

6. They filed the said suit against respondents for recovery of money on the basis of a promissory note dt.26-02-2009 said to have been executed by father of respondents, who died on 23-07-2011.

7. Summons in the suit were served on both the respondents. Only the 1st respondent/1st defendant engaged an Advocate and filed written statement, but the 2nd respondent remained *ex parte*. The

1st respondent did not enter witness box but cross-examined P.Ws.1 and 2. Thereafter the suit was decreed on 01-07-2015

8. On 12-09-2017, the 1st respondent/2nd defendant filed an application under Section 5 of the Limitation Act, 1963 to condone the delay of 775 days in filing application for setting aside the judgment and decree dt.01-07-21015 and also another application under Order IX Rule 13 C.P.C. to set aside said decree.

9. Curiously, the Court of the Additional Senior Civil Judge, Karimnagar gave same number to both the applications as I.A.No.655 of 2017.

10. In the affidavit filed in support of application filed for condonation, it is the case of the 1st respondent that after he filed written statement, he fell sick and had paralysis and brain stroke and had got admitted in Yashoda Hospital in Hyderabad on 04-07-2014. He stated that he got discharged on 07-07-2014 and was completely on bed rest. He stated that he again suffered a stroke and got hospitalized from 29-03-2015 to 04-04-2015 in Swetha Hospital, Karimnagar. He stated that he was then shifted to Hyderabad for better treatment and obtained regular treatment in Yashoda Hospital, Hyderabad. He alleged that he could not move from his house without assistance of other persons, and his counsel did not inform about the proceedings in the suit to him, and he himself could not approach the Court or counsel due to inability. He stated that he received summons in E.P.No.156 of 2016 filed by petitioners and then

he came to know about completion of trial. He therefore sought that the decree dt.01-07-2015 in O.S.No.110 of 2012 be set aside and delay of 775 days in seeking to set aside the said decree be condoned.

11. The petitioner opposed the condonation of delay stating that the delay is abnormal and cannot be condoned.

12. The Court below allowed the application for condonation of delay on 09-07-2018 in the following manner:

“The petitioner has filed the document dated 03-10-2015 under which he had submitted the application for reimbursement of medical bills, Emergency certificate dated 04-04-2015 shows the petitioner was admitted in the hospital on 29-03-2015 and he was discharged on 04-04-2015, he has filed essential certificate. Thereafter he has filed the discharge certificate of Swetha Hospital showing that he was in hospital from 29-03-2005 to 04-01-2015, the document shows at the relevant period the petitioner was undergoing treatment and he was in the hospital. Therefore, there is a sufficient cause for the petitioner for not appearing before the court. The petitioner has explained sufficient reason hence, the delay is condoned and the petitioner is permitted to file set aside petition.”

13. For the same reasons, on 25-07-2018, it also allowed the application filed under Order IX Rule 13 C.P.C.

14. Assailing the same, these Revisions are filed.

15. Learned counsel for petitioners contends that firstly the decree is not an *ex parte* in the sense that 1st respondent/2nd defendant had received summons in the suit, engaged a counsel by name R.Kiran Singh in the suit, cross-examined the witnesses for petitioners and did

not get into witness box at all, and therefore the Court below could not have entertained the application for condonation of delay as well as application under Order IX Rule 13 C.P.C.

16. I find considerable force in the contention of the learned counsel for petitioners because the 1st respondent/2nd defendant had knowledge about the proceedings in the suit since admittedly he received summons in the suit, engaged a counsel and even cross-examined the witnesses for petitioners in the suit. At no point of time did 1st respondent, through his counsel, informed the Court below that 1st respondent had suffered illness and is unable to give evidence.

17. In my considered opinion, the decree cannot be said to be an *ex parte* decree at all since 1st respondent/2nd defendant did not lead evidence in support of his defence for the reasons best known to him,

18. Even assuming for the sake of argument that it was an *ex parte* decree which was passed on 01-07-2015, since the admitted illness of 1st respondent/2nd defendant is prior to 01-07-2015, the 1st respondent could not have waited till 12-09-2017 to seek to set aside the *ex parte* decree and to file application seeking condonation of delay therein.

19. According to the 1st respondent, he is a businessman and he obviously has family members to take care of him when he was hospitalized. Nothing prevented the 1st respondent to contact his Advocate during pendency of the suit and instruct the Advocate appropriately to defend his interests. He could have even got

appointed an Advocate-Commissioner to record his evidence if he was unable to move from his residence. In my considered opinion, the 1st respondent has been totally negligent in defending his interests in the suit.

20. In **N. Balakrishnan Vs. M.Krishnamurthy**¹, the Supreme Court held that condonation of delay is a matter of discretion of the court and Section 5 of the limitation Act, 1963 does not say that such discretion can be exercised only if the delay is within certain limit. It held that *length of delay is no matter, acceptability of the explanation is the only criterion*. It also observed that the primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice and the time limit fixed for approaching the court in different situations is not because on the expiry of such time, a bad cause would transform into a good cause. It held that rules of limitation are not meant to destroy the rights of parties, but they are meant to see that parties do not resort to dilatory tactics and seek their remedy promptly. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. It observed that in every case of delay, there can be some lapse on the part of the litigant concerned, but that alone is not enough to turn down his plea and to shut the door against him. It declared that if the explanation does not smack of malafides and it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was

¹ (1998) 7 SCC 123

occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the court should compensate opposite party for his loss.

21. This decision was followed in **R. Krishna alias Kistaiah Vs. R. Bala Narasaiah (died) per LR. and others**² and delay of 502 days in filing application to set aside an *ex parte* decree was condoned on the ground that the counsel misled the party stating that he would call them as and when their presence is required, but did not do so and did not also represent the case, because of which the party was set *ex parte* and later *ex parte* decree was passed.

22. In **Basawaraj and another Vs. Special Land Acquisition Officer**³, the Supreme Court held that there is no strait jacket formula to apply when condonation of delay is sought. Though the expression “sufficient cause” in Section 5 of Limitation Act, 1963 should be given a liberal interpretation to ensure that substantial justice is done, where negligence, inaction or lack of bonafides are imputed to the party seeking condonation of delay, delay cannot be condoned. It reiterated that statute of limitation is founded on public policy and an unlimited limitation would lead to a sense of insecurity and uncertainty. It observed that limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party’s own inaction, negligence or laches. It declared that in case a party is found to be

² 2014(2) ALD 297

³ 2014(1) ALD 33 (SC)

negligent, or for want of *bona fide* on his part in the facts and circumstances of the case, or found not to have acted diligently or remained inactive, there cannot be a justified ground to condone the delay.

23. Having regard to the above principles of law, and having regard to the conduct of 1st respondent in not defending his interest in the suit as stated above, I am of the opinion that there is gross negligence, inaction and laches on the part of 1st respondent, and the delay of 775 days in filing application under Order IX Rule 13 C.P.C. could not have been condoned and even the application under Order IX Rule 13 C.P.C. cannot be allowed.

24. Therefore, the orders of the Court below dt.09-07-2018 and 25-07-2018 in I.A.No.655 of 2017 filed under Section 5 of the Limitation Act, 1963 to condone the delay of 775 days in filing application to set aside the *ex parte* decree, and other application filed to set aside the *ex parte* decree, are both set aside and both I.As. are dismissed.

25. The Civil Revision Petitions are allowed accordingly. No costs.

26. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 01-08-2019

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