

Pramod Kumar Sharma and ors. Vs. Upender Kumar Agarwal

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Court : Andhra Pradesh

Decided On : Feb-02-1995

Reported in : 1995(1)ALT539

Judge : B.K. Somasekhara, J.

Acts : [Limitation Act, 1963](#) - Sections 5; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13

Appeal No. : Civil Revision Petition Nos. 622 and 644 of 1994

Appellant : Pramod Kumar Sharma and ors.

Respondent : Upender Kumar Agarwal

Advocate for Def. : C. Jayashree Sarathy, Adv.

Advocate for Pet/Ap. : V. Venkataramana, Adv.

Disposition : Petition allowed

Judgement :

ORDER

B.K. Somasekhara, J.

1. These two revision petitions arise out of a common order passed in I.A. Nos. 931/91 and 932/91 in O.S.No. 1849/89 dated 21-2-1994 by the learned II

Additional Judge, City Civil Court, Hyderabad. I.A.No. 931/91 was filed Under Section 5 of the Limitation Act to condone the delay of 92 days in filing a petition under Order 9 Rule 13 CPC for setting aside the ex parte decree passed in the suit dated 21-3-1991. The petitioners in these two petitions were defendants and the respondent was the plaintiff in the suit - O.S.No. 1849/89, which was filed for recovery of money based on an award. The decree was sought for Rs. 1,72,500/- with future interest as decreed. Since the defendants did not file any written statement for a long time, they were set ex parte on 7-2-91 and after recording evidence of the plaintiff by the Court, the suit was decreed ex parte on 21-3-91. The defendants filed the petitions stated above on 3-7-91. Although the delay was found to be 102 days delay of 92 days was sought to be condoned. In the affidavit, the delay was sought to be explained by stating that the defendants had engaged one Advocate Mr. Peri Subba Rao who filed his vakalat but did not file his written statement and therefore, the case was adjourned from time to time, later he died and nobody could pursue the case including his son Advocate Mr. Peri Prabhakar who was quite new to the profession. Added to it, it is also pleaded that the delay was occasioned due to the death of the uncle of the defendants.

2. The petition was resisted by the plaintiff. After hearing both the sides, the learned II Additional Judge, City Civil Court, Hyderabad came to the conclusion that the defendants had failed to show sufficient cause for the delay in filing the petition for setting aside the ex parte decree and consequently not only dismissed such an application for condonation of delay, but also dismissed the petition for setting aside the ex parte decree. He has given number of reasons in the order, to demonstrate as to how the defendants were not diligent in the matter and as to how their case was sought to be demonstrated regarding their absence in the Court till the ex parte decree was passed.

3. The learned Advocate for the petitioners has pointed out that in a situation where the defendants were placed, they were helpless and although apparently their conduct may appear to be not diligent, it may not be termed as negligent because, after entrusting the matter to the learned Advocate, they were unfortunately, the learned Advocate died. Since Mr. Peri Prabhakar is said to be quite new to the profession, he could not take all the steps which are necessary to

inform the defendants and therefore, there was unavoidable delay resulting in passing of the ex parte decree.

4. Mr. V. Venkataramana, the learned Advocate for the defendants has depended upon an authoritative pronouncement of the Supreme Court in *Naubat Ram Sharma vs. Additional District Judge II, Moradabad*, AIR 1987 SC 1352, 1987 (II) ARC 121 and has contended that the Courts should not deal with matters filed Under Section 5 of the Limitation Act in a manner not to sub-serve the interests of justice to the parties and litigation and the guidelines in the pronouncement may be taken in true spirit so as to serve the ends of justice. Usefully, the expressions of the Supreme Court may be repeated as follows:

'1. Ordinarily a litigant does not stand to benefit by lodging an appellate.

2. Refusing to condone delay can result in a 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, 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 judiciary is respected 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'.

5. Mr. Saradhi, the learned Advocate for the respondent has very seriously contended that notwithstanding such general principles laid down in the precedent *supra*, each case has to be judged on its own facts and merits. He has pointed out that in this case not only the defendants failed to appear before the Court for a very long time, but did not care to exercise any diligence either by approaching their Advocate or his son to know about the state of affairs of the case much less showed any diligence to protect their interests particularly when there was already an award against them and in favour of the plaintiff and the stakes involved in the claim are high.

6. On a careful examination of the facts and circumstances of the case, although the learned trial Judge has given adequate and perhaps even convincing reasons to technically hold that the defendants had failed to show sufficient cause to condone the delay for filing the petitioner for setting aside the *ex parte* decree, this Court having been persuaded by the decision of the Supreme Court *supra*, feels that the learned trial Judge could have been, more liberal. When a matter is entrusted to an Advocate, the litigants normally depend upon him for further instructions. If the Advocate dies, there will be vacuum unless somebody informs the party about the death of the Advocate. It is also not improbable whether it is his own son or the Juniors, the death of a senior Advocate creates lot of dislocation in the management of the office of an Advocate. In such a situation it is possible that further proceedings of the suit as against the defendants could not have been known to them. Therefore, without judging the matter merely in a technical manner and applying the principles laid down by the Supreme Court in the decision *supra*, this Court feels that it will not be totally unjustified to accept the grounds set up by the defendants to hold that the delay in filing the petition for setting aside the *ex parte* decree was sufficiently explained. Moreover the reasons for delay given in the affidavit could not have been lightly dealt with, in the circumstances stated above. As a whole, this Court feels that the order of the trial Judge cannot be sustained. Therefore, the order of the learned II Additional Judge, City Civil Court deserves to be set aside.

7. Mr. Saradhi C.P. learned Advocate for the respondent is justified in urging that the defendants cannot be allowed to have the benefit of this order without serious

terms. This Court feels that certain terms putting the petitioners-defendants to a serious caution, should be imposed. The claim was for Rs. 1,72,500/-. The ex parte decree was passed after examining the plaintiff and recording evidence. The future interest has been awarded at 18% per annum. Therefore, Mr. C.P. Saradhi, the learned Advocate is right in saying that the total dues must be touching Rs. 3,00,000-00. Therefore, the terms to be mulcted on the petitioners-defendants should be that they should pay or deposit Rs. 1,00,000/- out of the decretal amount in addition to the entire costs awarded in the decree within a stipulated time.

8. In the result, the two revision petitions are allowed. The order of the learned II Additional Judge, City Civil Court, Hyderabad passed in I.A. Nos. 931/91 and 932/91 in O.S.No. 1849/89 dated 21-2-94 is set aside. Consequently, both the applications are allowed, the delay is condoned and the ex parte decree dated 21-3-91 in O.S.No. 1894/89 is set aside. The petitioners herein shall not have the benefit of this order unless they pay or deposit the suit costs into the Court within a period of two weeks from today and further more, unless they pay or deposit Rs. 1,00,000/- (one lakh only) within a period of six weeks from today. The plaintiff or his Advocate shall be at liberty to withdraw such an amount as per rules. If the petitioners-defendants fail to comply with the above directions within the stipulated period, the ex parte decree passed in the suit shall be taken as confirmed dismissing the application filed in the suit. This order is passed without prejudice to the rights and liabilities of the parties to be decided in the suit ultimately. No costs. The trial court is directed to expedite and dispose of the suit as early as possible regarding which both the sides shall co-operate.