

HON'BLE SRI JUSTICE BANDARU SYAMSUNDER

IA No.1 of 2023 in S.A.No.311 of 2023

ORDER:

I have heard learned Counsel for the petitioners Mr.K.A.Narasimham, as well as learned Counsel Mr.Akhil Chowdary Unnam, representing on behalf of Mr.Unnam Sravan Kumar, learned Counsel for the respondent.

2. This petition is filed by the petitioners/appellants under Section 5 of Limitation Act to condone the delay of 278 days in presenting the Second Appeal.

3. The brief averments in the affidavit of the 2nd petitioner/2nd appellant are that aggrieved by the Decree and Judgment of the First Appellate Court in AS No.148 of 2015 on the file of V Additional District Judge's Court, Tirupati, they preferred Second Appeal, as the First Appellate Court confirmed the Decree and Judgment passed in OS No.85 of 2004 on the file of Senior Civil Judge's Court, Puttur. The petitioner submits that OS No.85 of 2004 filed by the respondent as a counter blast to their suit for partition in OS No.37 of 2004 on the file of Senior Civil Judge's Court, Puttur. The main contention of the petitioner is that both appeals preferred by them were dismissed by the First Appellate Court on 12.04.2021. It is also the contention of the petitioner that their Counsel,

who represented their case before First Appellate Court became sick, and hospitalized for more than one year, due to that they could not secure their case file and certified copies of Decree and Judgment to prefer the Second Appeal in time. He has also stated that by the date of passing of Decree and Judgment by the First Appellate Court, they were caught in the fear phobia of pandemic disease of Corona, and after some time on securing certified copies of Decree and Judgment and other relevant papers from the Office of their Counsel with the help of some known Advocate, they preferred Second Appeal, which involves substantial question of law, and both Courts have not properly appreciated their case, due to that reason the delay in preferring the Second Appeal occurred. They pray to condone the delay of 278 days in presenting the Second Appeal.

4. The petitioners also filed better affidavit of the 2nd petitioner, stating that their appeals were dismissed on 12.04.2021 by the First Appellate Court. They submit that their Counsel Mr.I.Guruswamy, who attacked with Corona virus during Covid-19 first phase, has been hospitalized even prior to disposal of above appeal, and could not recover by the date of arguments of their appeal AS No.148 of 2015, due to that one of the colleagues of his Office advanced the arguments on their behalf, and it was disposed of without argument of their Counsel Mr.I.Guruswamy. They have stated that Mr.I.Guruswamy had been shifted to Apollo

Hospital, Chennai, where he underwent treatment for more than two years, and recently on 21.07.2023 he died in the Apollo Hospital, Chennai, due to that they could not secure case file and certified copies of Decree and Judgment passed by the First Appellate Court in time, for that reason delay occurred in presenting the Second Appeal.

5. The petitioners also filed affidavit of Mr.A.Bhoopathy said to be Junior Counsel for Mr.I.Guruswamy, Counsel for the petitioners/appellants before the First Appellate Court, wherein it is stated that he assisted his Senior Counsel Mr.I.Guruswamy during the course of First Appeal AS No.148 of 2015, and when the matter is reached the stage of arguments, prior to Covid-19 pandemic, his Senior Counsel Mr.I.Guruswamy appeared and argued the matter physically, virtually and finally on 07.04.2021 his Senior Counsel argued the appeal in virtual mode and then the trial Court delivered the Judgment on 12.04.2021 by dismissing the appeal. He also stated that his Senior Counsel infected Covid-19 and admitted in private hospital at Tirupati on 24.04.2021, and thereafter shifted to Apollo Hospital, Chennai, wherein he was under observation for two years and eventually succumbed to the death on 21.07.2023. He submits that after the death of his Senior Counsel, the petitioners/appellants engaged another Counsel and obtained certified copies for preferring the present Second Appeal.

6. The respondent filed counter-affidavit and reply affidavit, denying the averments in the affidavit of the 2nd petitioner and also contents in the affidavit of the Junior Counsel of Mr.I.Guruswamy, Counsel for the petitioners before the First Appellate Court. He submits that an application for certified copies applied on 20.12.2022, which were made ready on 29.12.2022, but the Second Appeal is preferred on 12.05.2023, for which, the petitioners failed to mention any reason why some other Counsel was not approached promptly to seek certified copies of Decree and Judgment. It is also the contention of the respondent that as per the *ratio* laid down by the Hon'ble Apex Court in various decisions, which he has stated in his counter-affidavit unless sufficient reason is shown, the delay should not be condoned as right accrued to the party cannot be taken away on flimsy grounds put-forth by the petitioners while seeking condonation of delay. He also stated in additional affidavit that the affidavit of the 2nd petitioner shows that their Advocate Mr.I.Guruswamy had attacked with Corona virus even prior to disposal of the First Appeal, and could not recover by the date of argument, whereas the affidavit said to be the Junior Counsel of Mr.I.Guruswamy shows that his Senior Counsel appeared physically before the Court and argued the matter on 07.04.2021 and Judgment of the First Appellate Court was pronounced on 12.04.2021, which itself shows that the petitioners have invented the cause while seeking to condone the delay in preferring the appeal. He

further submits that a perusal of Judgment in AS No.148 of 2015 also shows that Mr.I.Guruswamy argued the matter through video conference on 07.04.2021, which is contra to the contention of the petitioners in the affidavit of the 2nd petitioner. It is the contention of the respondent that though the petitioners are legally bound to state the truth, they willfully made false statement in sworn affidavit, which also constitutes the offence under Section 191 of CPC and Section 227 of BNS. He prays to dismiss the petition.

7. The learned Counsel for the petitioners would submit that the death of Counsel, who presented the First Appeal on behalf of the petitioners due to affecting with Corona is not in dispute. He would further submit that while considering the applications under Section 5 of Limitation Act to condone the delay in presenting civil appeals, there should be a liberal, pragmatic, justice-oriented, non-pedantic approach is required and an opportunity has to be given to the petitioners to present the Second Appeal, which involves a substantial question of law. It is the contention of the learned Counsel for the petitioners that though there is some discrepancy in the affidavit of the 2nd petitioner and the affidavit of the Junior Counsel of Mr.I.Guruswamy filed in support the case of the petitioners, the fact remains is that Mr.I.Guruswamy, Counsel who represented the petitioners before the First Appellate Court died due to Corona, and he was hospitalized for considerable period, for which the

petitioners have also filed medical record. He argued that when rights of parties involved in valuable immovable property, and when sufficient cause is shown, the petition filed to condone the delay in presenting the Second Appeal has to be condoned. He relied on the following precedent law:

1) *Esha Bhattacharjee. Appellant vs. Managing Committee of Raghunathpur Nafar Academy and others. Respondents. (2013) 12 Supreme Court Cases 649*, wherein it is held that:

“The principles applicable to an application for condonation of delay are as follows:

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 encapsulate 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.*

xiv) *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.*

xv) *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.*

xvi) *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.*

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

2) Sridevi Datla. Appellant vs. Union of India and others.

Respondents. (2021) 5 Supreme Court Cases 321, wherein the Hon'ble Apex Court held at para No.24, which reads as under:

“24.In G.Ramegowda v. LAO (1988) 2 SCC 142, speaking for this Court, Venkatachaliah, J. summarized the position in the following terms: (SCC pp.147-48, para 14)

“14. The contours of the area of discretion of the courts in the matter of condonation of delays in filing appeals are set out in a number of pronouncements of this Court. See: Ramlal v. Rewa Coalfields Ltd. (1962) 2 SCR 762 : AIR 1962 SC 361, Shakuntala Devi Jain v. Kuntal Kumari (1969) J SCR 1006 : AIR 1969 SC 575, Concord of India Insurance Co. Ltd. V.Nirmala Devi (1979) 4 SCC 365: 1979 SCC (Cri) 1996: (1979) 3 SCR 694, Mata Din v. Narayan (1969) 2 SCC 770: (1970) 2 SCR 90, and LAO v. Katiji (1987) 2 SCC 107: 1989 SCC (Tax) 172, etc. There is, it is true, no general principle saving the party from all mistakes of its counsel. If there is negligence, deliberate or gross inaction or lack of bona fides on the part of the party or its counsel there is no reason why the opposite side should be exposed to a time-barred appeal. Each case will have to be considered on the particularities of its own special facts. However, the expression “sufficient cause” in Section 5 must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of the delay.”

3)Trust Association of CBCNC vs. M/s.H.R.R.Constructions Private Limited and others. 2024 (4) ALT 386 (DB) (AP), wherein the Hon'ble

Division Bench of this Court held that when substantial justice and technical considerations are pitted against each other, substantial justice has to be preferred.

He prays to allow the petition.

8. The learned Counsel, representing the respondent would submit that party who is seeking for condonation of delay must come up with true facts, and when admittedly facts stated by the party in the affidavit, which are contradictory, which have to be discarded and cannot be considered while considering the application to condone the delay. He would further submit that the affidavit of the 2nd petitioner shows that the learned Counsel, who represented the petitioners before the First Appellate Court affected Corona before submitting the arguments, whereas the affidavit of his Junior Counsel shows that his Senior Counsel submitted the arguments on particular day, and thereafter the First Appellate Court pronounced Judgment, which itself shows that the petitioners have created cause while seeking to condone the delay in preferring the Second Appeal. It is the contention of the learned Counsel for the respondent that there is lack of bonafides in the contention of the petitioners while seeking to condone the delay in presenting the Second Appeal. He argued that as per the *ratio* laid down by the Hon'ble Apex Court in Esha Bhattacharjee case, 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 and an application for condonation of delay should be drafted with careful concern and not in a half hazard manner. He argued that the affidavits filed by the 2nd petitioner and the Junior Counsel of Mr.I.Guruswamy, which itself show that the cause which the petitioners have projected is invented for the purpose of filing Second Appeal, and there is no substantial question of law involved in the Second Appeal to condone the delay. He also relied on the *ratio* laid down by the Hon'ble Apex Court in Esha Bhattacharjee case referred *supra*, and relied on the *ratio* laid down by the Hon'ble Apex Court in ***Perry Kansagra...Alleged Contemnor. 2022 SCC OnLine SC 858*** to support his contention that a person who makes a false statement before the Court and makes an attempt to deceive the Court, interferes with the administration of justice, and is guilty of contempt of Court.

He prays to dismiss the petition.

9. Now the point that emerges for consideration of this Court is:

“Whether there are any grounds to condone the delay of 278 days in filing the Second Appeal?”

10. **POINT:-**

Before going to the merits of the case, it would be beneficial to quote Section 5 of Limitation Act, which reads as under:

“Extension of prescribed period in certain cases:

“Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period”.

11. The Hon'ble Apex Court in Esha Bhattacharjee case, laid down the principles to be considered when an application is filed, seeking condonation of delay, which are discussed *supra*.

12. The Hon'ble Apex Court in ***Pathapati Subba Reddy (Died) By L.Rs. and others. Petitioners vs. The Special Deputy Collector (LA). Respondent in Special Leave Petition (Civil) No.31248 of 2018, Judgment dated 04.08.2024***, reiterated same principles and held at Para No.26 of the Judgment, which reads as under:

“26. On a harmonious consideration of the provisions of the law, as aforesaid, and the law laid down by this Court, it is evident that:

(i) Law of limitation is based upon public policy that there should be an end to litigation by forfeiting the right to remedy rather than the right itself;

(ii) A right or the remedy that has not been exercised or availed of for a long time must come to an end or cease to exist after a fixed period of time;

(iii) The provisions of the Limitation Act have to be construed differently, such as Section 3 has to be construed in a strict sense whereas Section 5 has to be construed liberally;

(iv) In order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind but the same cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act;

(v) Courts are empowered to exercise discretion to condone the delay if sufficient cause had been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as, where there is inordinate delay, negligence and want of due diligence;

(vi) Merely some persons obtained relief in similar matter, it does not mean that others are also entitled to the same benefit if the court is not satisfied with the cause shown for the delay in filing the appeal;

(vii) Merits of the case are not required to be considered in condoning the delay; and

(viii) Delay condonation application has to be decided on the parameters laid down for condoning the delay and condoning the delay for the reason that the conditions have been imposed, tantamounts to disregarding the statutory provision”.

13. The Hon'ble Division Bench of this Court while considering the application filed under Section 5 of Limitation Act, seeking condonation of delay in filing the Second Appeal, elaborately discussed the *ratio* laid down by the Hon'ble Apex Court in various decisions, including the decision in Esha Bhattacharjee case referred *supra*, and held that when substantial justice and technical considerations are pitted against each other, substantial justice has to be preferred.

14. In the present case, the reason which the petitioners have stated for delay in presenting the appeal is that the Counsel whom they engaged before the First Appellate Court became sick and hospitalized for more than one year, due to that they could not secure their case file and failed to obtain certified copies of Decree and Judgment to prefer the Second Appeal in time. They also filed better affidavit of the 2nd petitioner, wherein they have stated that their Counsel at the First Appellate Court

Mr.I.Guruswamy was hospitalized even prior to disposal of the First Appeal and could not recover by the date of arguments. The affidavit of the Junior Counsel of Mr.I.Guruswamy shows that his Senior Counsel Mr.I.Guruswamy appeared and argued the matter physically and virtually due to Covid-19 pandemic and finally on 07.04.2021 his Senior Counsel argued AS No.148 of 2015 in virtual mode, and the First Appellate Court delivered Judgment on 12.04.2021. It is no doubt true that the affidavit of the 2nd petitioner shows that their Counsel Mr.I.Guruswamy was attacked with Carona and he was hospitalized even prior to submitting the arguments in AS No.148 of 2015, whereas the affidavit of the Junior Counsel of Mr.I.Guruswamy shows that his Senior Counsel argued the matter physically and also virtually. Though, there is some discrepancy in both affidavits filed by the petitioners, the fact remains is that Mr.I.Guruswamy, Counsel who represented the petitioners before the First Appellate Court was attacked with Corona virus, who was hospitalized for considerable period, and he passed away on 21.07.2023 due to Covid-19.

15. A perusal of Judgment passed by the First Appellate Court in AS No.148 of 2015, wherein it is stated that the matter has been heard on both sides through video conferencing, but the arguments which they have submitted are not reflected in the Judgment in AS No.148 of 2015 to come to conclusion that Mr.I.Guruswamy has submitted the arguments in

AS No.148 of 2015, though it is stated that “heard both sides Counsel and perused the record”. The dispute between the parties is in respect of immovable property, suit and counter-suit have been filed by both sides and the petitioners are contending that there is substantial question of law to be decided in the Second Appeal. But the fact remains is that valuable rights of the parties involved in *lis*. When the death of Counsel, representing the petitioners before the First Appellate Court due to Corona pandemic period is not in dispute, and in view of the *ratio* laid down by the Hon’ble Apex Court in the above referred decisions, and also by following the *ratio* laid down by the Hon’ble Division Bench of this Court that when substantial justice and technical considerations are pitted against each other, substantial justice has to be preferred, this Court is of an opinion that sufficient cause has shown by the petitioners while seeking condonation of delay in presenting the Second Appeal.

16. In the result, the petition is allowed. The delay of 278 days in presenting the Second Appeal is hereby condoned.

JUSTICE BANDARU SYAMSUNDER

Dt:06.08.2024.

Bsv

THE HON'BLE SRI JUSTICE BANDARU SYAMSUNDER

IA No.1 of 2023 in S.A.No.311 of 2023

Date: 06.08.2024

Bsv