

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 29 OF 2014
IN
FAMILY COURT APPEAL NO.1075 OF 2014

Mrs. Vijaya Virendra Kerkar. .. Applicant

Vs

Mr. Virendra Suresh Kerkar. .. Respondent

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Shri Ashutosh M. Kulkarni and Shri Akshay Shinde for the Applicant.
Shri Harihar Bhavé along with Ms. Rupa Bhavé and Ms. Ruta Deodhar
for the Respondent.

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CORAM : A.S. OKA & A.A.SAYED, JJ
DATED : 24TH AUGUST 2016

PC.

1. Heard learned counsel appearing for the Applicant and the learned counsel appearing for the Respondent. The prayer is for condonation of delay of more than five years in filing the Family Court Appeal. The challenge in the Family Court Appeal by the Applicant wife is to the ex parte decree of divorce passed on the ground of desertion under the Hindu Marriage Act, 1955. The Application is strongly opposed by the learned counsel for the Respondent pointing out that the delay is of more than five years and that not only that the Respondent has remarried but he now has a child from the second marriage.

2. On the earlier date, we had suggested to the parties to consider of amicable settlement of the dispute. However, amicable settlement could not be arrived at.

3. According to the case made out in the Application, the Applicant was never served with the notice of the Petition for divorce by the Respondent husband. The case made out in the Application is that after the Applicant became aware for the first time in September 2011 about the second marriage of the Respondent, initially a legal notice was served and thereafter a police complaint was filed by the Applicant. It is alleged that during the course of inquiry before the police, the Respondent produced a copy of the decree which is subject matter of challenge in the Appeal. According to the case of the Applicant, a copy of the decree was produced in May 2012. In October 2012, the Applicant applied for setting aside the ex parte decree. As there was a delay in making the Application, the Application for condonation of delay was taken out. The learned Judge of the Family Court on 1st April 2013 rejected the Application for condonation of delay. Being aggrieved by the said order, the Applicant filed an Application in this Court on 4th October 2013. The said Application was withdrawn with liberty to file Family Court Appeal against the impugned decree. On 9th January 2014, the present Appeal has been filed along with the delay

condonation Application. The opposition of the learned counsel appearing for the Respondent is on the ground that the record will show that the Applicant was duly served with the notice of the divorce Petition filed by the Respondent. His submission is that the ground taken in the Application that there was no proper service of notice was completely erroneously. His further submission is that after following due procedure, service was effected and as the Applicant did not appear, the Family Court proceeded to pass a decree. The Respondent is relying upon a certificate of marriage showing that he remarried on 12th November 2008. The submission is that at every stage, there is a delay on the part of the Applicant.

4. The Apex Court has repeatedly held that while dealing with the Application under Section 5 of the Limitation Act, 1963, the Court has to adopt a liberal and justice oriented approach. We have perused the impugned Judgment. Prima facie, it appears to us that in the impugned judgment, there is no satisfaction recorded by the learned Judge of the Family Court as provided in Clause (a) of Sub-section (1) of Section 23 of the Hindu Marriage Act, 1955. Apart from that, the question is whether the Applicant was duly served with the notice of divorce Petition. It is true that after the impugned decree, the Respondent appears to have remarried and there is a child born after remarriage.

5. Therefore, by adopting the justice oriented approach, the Appeal will have to be considered on merits by condoning the delay. While deciding the Application for condonation of delay, final adjudication cannot be made on the question whether the Applicant was duly served with the notice of the divorce petition. The said issue will have to be gone into while hearing the Family Court Appeal. While hearing the Family Court Appeal, the Respondent can always point out the subsequent events of his remarriage and birth of a child.

6. Taking an overall view of the matter, in our opinion, sufficient cause is made out to condone the delay. The delay is condoned. The Application is allowed. We, however, make it clear that no final adjudication is made by this Court on merits of the impugned decree and the observations made in this order are only for limited purpose of considering the prayer for condonation of delay.

7. Accordingly, we allow the Application by condoning the delay.

8. Place the Family Court Appeal under the caption of “Fresh Admission” on 28th September 2016.

9. R&P is already received. The Registry shall ensure that the R&P is placed along with the Family Court Appeal on the next date. The parties are directed to remain present in Court on the next date so that if necessary, the matter will be heard in Chamber on the very date.

(A.A. SAYED, J)

(A.S. OKA, J)