

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
APPELLATE SIDE
NAGPUR BENCH, NAGPUR

WRIT PETITION NO. 2237 OF 2015

Pankaj Harkut Vs. Rupali Pankj Harkut

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Office Notes, Office Memoranda of Coram,
appearances, Court orders or directions
and Registrar's orders

Court's or Judge's Order

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Shri R. L. Khapre Adv for petitioner.
Shri S. N. Bhattad Adv for respondent.

CORAM: A. S. CHANDURKAR J.

DATED: 9th JUNE, 2016.

Heard. The petitioner is aggrieved by the order dated 20.12.2014 passed by the appellate Court thereby condoning the delay in filing an appeal under Section 96 of the Code of Civil Procedure, 1908 (for short, the Code).

Few facts which are found relevant for considering the challenge to the impugned order are as under:

The petitioner and the respondent were married on 08.12.2010. On account of differences between them, the petitioner filed proceedings for seeking divorce from the respondent. On 28.11.2012 an ex-parte decree came to be passed in aforesaid proceedings as a result of which the decree for divorce came to be passed. On 31.12.2012 the respondent moved an application for setting aside the ex-parte decree. During pendency

of the said proceedings, the respondent filed an appeal under Section 96 of the Code along with an application for condonation of delay. By order dated 20.12.2014 the Appellate Court condoned the delay in filing said appeal. The petitioner being aggrieved by the order dated 20.12.2014 has filed the present petition. In the meanwhile, on 27.01.2015 an application moved by the respondent for setting aside the ex-parte decree came to be dismissed.

Shri R. L. Khapre, the learned counsel for the petitioner submitted that the Appellate Court was not justified in condoning the delay in filing the appeal. He submitted that the respondent had not led any evidence in support of the application for condonation of delay. Said prayer for condonation of delay was sought to be supported merely on the basis of averments in the application. According to him it was necessary for the respondent to have substantiated the statements made in the application for condonation of delay. Merely because said application was filed along with an affidavit, the same could not be treated as evidence in support of the prayer for condonation of delay. According to him the reasons assigned in the said application were not sufficient for condoning the same. The Appellate Court could not have accepted the stand of the respondent in absence of affidavit as

contemplated by provisions of Order XIX Rule I of the Code. In support of his submission the learned counsel placed reliance on the decision reported in *Damu Ganu Bendale Vs. Arvinda Dhondu Talekar and others AIR 1994 Supreme Court 1303; Smt Sudha Devi Vs. M. P. Narayanan and others AIR 1988 Supreme Court 1381 and Messrs Shamsunder Rajkumar a Firm dealing in Oil, Cakes etc. Calcutta Vs. Messrs Bharat Oil Mills Nagpur AIR 1964 Bombay 38.*

It was then submitted that as the respondent did not examine herself in support of the said application, there was no occasion for the petitioner to cross examine her. In that regard he relied upon the decision in *Tej Prakash Vs. State of Haryana 1995 AIR SCW 4143*. He therefore submitted that only after recording the evidence it would have been proper for the Appellate Court to have considered the prayer for condonation of delay. He also placed reliance on the decision in *Ramkrishna Vs. State 1976 Maharashtra Law Journal NOC 60* and *Rajkumar Pundlikrao Zape and others Vs. Shantaram Amrutrao Waghmare and others 2008(3) Maharashtra law Journal 209*.

It was then submitted that in view of the subsequent order dated 27.01.2015 by which the application for setting aside

ex-parte decree had been rejected, the case as pleaded by the respondent did not deserve to be accepted. He submitted that the respondent had failed to show sufficient reason for not participating in the proceedings resulting in an ex-parte decree. As said issue had been answered against the respondent she was estopped from relying upon said circumstance in the application for condonation of delay. He, therefore, submitted that the aspect of issuing estoppel also arose. He relied upon the judgment in *Bhanu Kumar Jain Vs. Archana Kumar and another AIR 2005 Supreme Court 626*.

Shri S. N. Bhattad, learned counsel for the respondent on the other hand supported the impugned order. According to him the Appellate Court was justified in accepting the explanation furnished by the respondent for having the delay condoned. He submitted that in the application itself the reasons as to why delay had been caused had been explained and the subsequent refusal by the trial Court to set aside ex-parte decree was not relevant. He referred to the provisions of Order LXI Rule 3A of the Code and submitted that the application filed by the respondent along with her affidavit was sufficient to enable the Court to consider the prayer for condonation of delay. According to him in view of

provisions of Section 21 of the Hindu Marriage Act, 1955 strict compliance with the provisions of the Code were not required. In that regard he relied upon the decision of the learned Single Judge in *Vanita Pravin Gaikwad Vs. Pravin Pundlik Gaikwad AIR 2010 Bombay 62*. He also referred to the judgment of the Hon'ble Supreme Court in *Balwinder Kaur Vs. Hardeep Singh (1997) 11 Supreme Court Cases 701*.

It was then submitted that two remedies were available in a case where an ex-parte decree is passed. Remedy under provisions of Order IX Rule 13 of the Code as well as the remedy under Section 96 of the Code could be availed. According to him subsequent order dated 27.01.2015 would at the most preclude the respondent from canvassing that the ex-parte decree as passed was not in accordance with law. However, it was open for the respondent to challenge the said decree on merits. In that regard he relied upon the observations made in para 38 of the decision in *Bhanu Kumar Jain* (supra). He, therefore, submitted that there was no case made out to interfere in writ jurisdiction.

I have heard the respective counsel for the parties at length and perused the documents filed on record. The ex-parte decree in question is dated 28.11.2012. The respondent invoked

both the remedies available to her in law. In so far as the proceedings under provisions of Order IX Rule 13 of the Code are concerned, the said application stands dismissed in view of the order dated 27.01.2015 passed by the trial Court. This order has not been challenged further and the same has attained finality. It is in this background that the challenge to the impugned order condoning delay would have to be considered.

In the application for condonation of delay it has been stated by the respondent that initially she had filed an application for setting aside the ex-parte decree. Thereafter in paras 6 and 7 of the application it has been stated that the respondent was advised to challenge the ex-parte judgment also on merits. In para 8 of the application it has been stated that she was attending duties as Medical Officer and due to hardships faced by her, the appeal could not be filed within limitation. In the reply filed on behalf of the petitioner it has been stated that the grounds as pleaded were not sufficient for condoning the delay. There was no explanation for every day's delay. It was stated that the respondent has slept over her rights and hence the delay could not be condoned.

Before the Appellate Court both the parties stated that they did not desire to lead any evidence in support of their

respective stands. The learned District Judge found that by the impugned judgment the marriage between the parties had been declared as void on the ground that the respondent was suffering from psychopathic disorder. It then found that the respondent was prosecuting the remedy under provisions of Order IX Rule 13 of the Code after which the appeal also came to be filed. It then found that the respondent could not be said to be negligent nor could the delay said to be deliberate. On that count the delay came to be condoned.

Considering the aspect of necessity of evidence being required to be led in support of the prayer for condonation of delay, it is to be seen that the same would depend upon the facts of each case. It is for the applicant in a particular case to consider whether evidence is to be led in support of the prayer for condonation of delay or not. It cannot be said as a rule that in every case where a prayer for condonation of delay has been made, the parties have to lead evidence. It is for the Court which considers the application for condonation of delay to come to the conclusion as to whether the delay has been properly explained or not. If on the basis of statements made in the application supported by an affidavit it is found by the Court that the reasons

as assigned are sufficient for condonation of delay the same can be condoned. Merely because the applicant has not led evidence in support of the prayer for condonation of delay, the same cannot be a ground for vitiating the order condoning delay. In the present case the Appellate Court after considering the averments made in the application and in the reply found that there was sufficient case for not preferring the appeal within the limitation. It has been found that it was not a case that the delay was deliberately caused. The respondent was also pursuing the application for setting aside ex-parte decree besides being employed as a Medical Officer. On that basis the Appellate Court exercised discretion in favour of the respondent. It is well settled that if the first Court condones the delay, the superior Court would be slow in interfering with said discretion unless the same has been exercised in the manner contrary to law or that such conclusion could never have been reached in the facts of the case.

In that view of the matter, it cannot be said that merely because the appellant did not lead any evidence she was precluded from relying upon her application in support of the prayer for condonation of delay. The Appellate Court having found the explanation be sufficient, said order does not deserve to be

interfered with. The decisions relied upon by the learned counsel for the petitioner therefore cannot be made applicable in the aforesaid background.

In so far as the subsequent rejection of the application for setting aside the ex-parte decree is concerned, the effect thereof would be as laid down in para 38 of the decision in ***Bhanu Kumar Jain*** (supra). While it would not be permissible for the respondent herein to argue in the appeal that the trial Court had wrongly proceeded ex-parte against the respondent, it would be open for the respondent to challenge said decree on its merits. Moreover, subsequent rejection of the application for setting aside ex-parte decree cannot be held to the prejudice of the respondent in proceedings for condonation of delay in challenging said decree. Said submission therefore also cannot be accepted.

In view of aforesaid, there is no case made out to interfere in writ jurisdiction. The order impugned does not call for any interference. The writ petition is therefore dismissed with no order as to costs.

JUDGE