

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.03.2016

CORAM

THE HONOURABLE **Dr.JUSTICE S.VIMALA**

CRP (NPD) No.3237 of 2015

A.Raja Sundari,
W/o.D.Suresh Kumar,
342, Seetha Nagar,
Sivaji Nagar Extension,
Thanjore.

.. Petitioner

Vs

Suresh Kumar
S/o. K.Dhakshnamurthy
No.43, Medavakam Main Road,
Puzhluthivakkam (Madipakkam)
Chennai – 600 091.

.. Respondent

Prayer:- Civil Revision Petition filed under Section 115 of Civil Procedure Code, praying to set aside the order dated 05.02.2014 in I.A.No.200/2011 in HMOP No.87/2008 passed by the Subordinate Judge, Tambaram and allow this Revision Petition.

For Petitioner
For Respondent

:Mr.J.James
:Mr.P.R.Thiruneelakandan

ORDER

“For want of a nail, the shoe was lost
For want of a shoe, the horse was lost
For want of a horse, the rider was lost
For want of a rider, the message was lost
For want of a message, the battle was lost
For want of a battle, the kingdom was lost
and all for the want of a horseshoe nail”

- Benjamin Franklin

1.1. Here is a case, where, for want of care, kingdom of matrimony is lost for the revision petitioner.

2. The following issues have been raised by the revision petitioner in this case:-

1. When a marriage is dissolved by a decree of divorce and when the time for preferring the appeal is over, whether it shall be lawful for either party to marry again thereafter, as contemplated under Section 15 of the Hindu Marriage Act?
2. When the husband who obtained the decree for divorce chooses to marry after the appeal time is over, and thereby exercised his right under Section 15 of the Hindu Marriage Act, whether that right can be taken away, when there is inordinate and shocking delay in prosecuting the application to set aside the exparte decree, filed by the wife?
3. When the remarriage contracted is valid and on account of the remarriage, the right of the wife (remarried) intervenes, whether that would be a relevant factor to be considered in deciding the application to set aside the exparte decree/ to condone the delay in filing the application to set aside the exparte?
4. When there is a decree crystalizing the rights and obligations of either spouse and on account of the same, there is a subsequent marriage resulting in the third party rights having been allowed to intervene, whether this subsequent event (marriage) is a crucial factor to be taken into account, as there cannot be two valid marriages of a person existing at the same time?

3. In order to decide these issues, the path traveled by this case, as is evident from the dates and events, are relevant. These dates and events, as furnished by the learned counsel for the revision petitioner/wife, is a tell-tale of the procrastinating attitude of the wife.

<i>S.No.</i>	<i>Date</i>	<i>Events</i>
1.	28.03.2007	Marriage between the revision petitioner/wife and the respondent at Swamimalai Subramaniya Swamy Temple, Thanjavur.
2	04.01.2008	Out of the wedlock the petitioner gave birth to a male child in a hospital at Tanjore.
3.	04.08.2008	The respondent (husband) filed HMOP No.87/2008 on the file of the Sub-ordinate Judge, Tambaram, seeking divorce.
4.	11.02.2010	The Sub-ordinate Judge, Tamabaram set the petitioner exparte
5.	15.04.2010	The petitioner filed set aside petition before the Sub-ordiante Judge, Tambaram with a delay of 24 days.
6.	17.06.2010	An exparte decree was passed by Sub-ordinate Judge, Tamabaram.
7.	12.04.2012	The petition to condone the delay was dismissed for default and on the same day restoration petition filed with A.O.S.
8.	05.02.2014	I.A.No.200 of 2011, the petition to condone the delay has been dismissed by the Sub-ordinate Judge, Tambaram
10.	06.04.2014	The respondent (husband) has contracted second marriage.

<i>S.No.</i>	<i>Date</i>	<i>Events</i>
		(According to the marriage certificate)
11.	11.07.2014	Registered the second marriage at Kundrathur Registered Office.
12.	07.07.2014	The petitioner has filed this present CRP.No.3237 of 2014.

4. The details furnished gives the answer for the following questions:-

When the exparte decree has been passed on 17.06.2010, and when the husband has contracted second marriage on 06.04.2014 i.e., nearly 4 years less two months (17.06.2010 to 06.04.2014), whether this remarriage can be overlooked, while considering an application to set aside the exparte decree filed by the wife (along with an application to condone the delay)?

4.1. When the exparte **decree** has been passed on 17.06.2010, whether the conduct of the wife in not prosecuting her application to set aside the exparte decree for nearly four years i.e., (dismissal of her petition on 05.02.2014), can be condoned especially when there is a remarriage by the husband in the meantime.

5. Under normal circumstances, in matrimonial issues, especially when the interest of the child is also involved, no Court would have hesitated to condone the delay of 24 days, if really the delay is only 24 days from the date of passing of the decree.

5.1. But, here is a case, even though the delay is stated to be 24 days, the application was kept pending for years together and in the meantime much water has flown under the bridge (in between the exparte decree and the step taken by the wife to set aside the exparte decree). In the interregnum, the husband has remarried.

5.2. In other words, the subsequent event that took place in the life of the husband, by which the right of a third party has intervened, what should be the approach of the Court in condoning the delay. In other words, whether the approach of the Court in dismissing the application to condone the delay is justified.

6. The lower Court has highlighted the conduct of the wife in dealing with the application to set-aside the exparte decree and the important observations are as under:

1) Though exparte order was passed against the wife on 11.02.2010, the petition under Order 9 Rule 13 has been filed on 15.04.2010; she failed to

appear for the first hearing on 04.08.2011.

- 2) From 05.07.2011 to 12.04.2012, batta was not paid.
- 3) On 12.04.2012, not only batta was not paid, but the petitioner also did not appear and therefore the application was dismissed.
- 4) On the very same day, though application was filed to restore the same batta memo got returned and not represented till 05.07.2012.

7. Therefore, it is evident that at every stage, the revision petitioner / wife has exhibited supine indifference. When there is a duty to act with expedition at all stages, and if the petitioner is guilty of inordinate and unwarranted delay, coupled with failure to observe the time frame, then the liability to suffer the consequences of dismissal, for want of prosecution, is inevitable.

8. The learned counsel for the respondent had submitted that the petition to set aside the exparte decree itself is not maintainable, when one of the parties have remarried. To support this contention, he has relied upon the following decisions :

1) *AIR 1997 Raj 63 [Surendra Kumar Vs. Kiran Devi]*

"6. It has not been disputed before me that

after passing of the ex parte decree in favour of the petitioner by the Distt. Judge on 11-8-1992, the petitioner contacted a second marriage after four months. In such a situation, the important question that arises for determination is whether the exparte decree can be set aside?

7. This question arose in Harjeet Singh v. Guddi's case, (1987) 1 Rajasthan LR 520, and it was held by this Court that when second valid marriage is contacted, it is in the interest of justice to dismiss the application for setting aside the ex parte decree for divorce. Again the same question was considered in Smt. Shimla Devi v. V. Kiran Kumar's case, (1994) 3 WLC 519, and it was held that by contacting a second marriage, the interest of second wife intervenes. Reference was also made to P. Venkateswarlu v. Motor & General Traders, AIR 1975 SC 1409 for the proposition that all the Surendra Kumar vs Kiran Devi on 10 January, 1997 proceedings of the courts can and must take conscious cognizance of events and developments subsequent to the institution of the proceedings provided the rules of fairness to both the sides are scrupulously obeyed. For the above reasons, it was held that the application moved by the first wife under Order 9, Rule 13 for setting

aside the exparte decree passed against her and in favour of her husband was not maintainable."

2) 1989 Supreme (mad) 321 [*Union of India v. Cavalier Shipping Company, Madras and Another*]

"10. The question of dismissing proceedings on the ground of inordinate delay or non-prosecution has been considered by English Courts. In The 'Mollymawk'. (1974) 1 Lloyd's Law Rep 32, Justic Brandon held that in order to succeed in an application for striking out the proceedings on the ground of delay, the defendants should show (a) that there had been an inordinate delay by the plaintiffs in prosecuting the claim: (b) that such a delay was inexcusable : and (c) that the defendants would, or were likely to be seriously prejudiced by the delay. Though the learned Judge in that case found that the delay of over four years was inordinate, he held on the facts that it was not proved that the defendants were prejudiced by the delay so as to make a fair trial impossible. On that ground, he refused to strike off the proceedings."

3) 2014 Supreme (Cal) 529 [*Jharna Rani Ghosh alias Jharna Ghosh Vs. Prabir Kumar Ghosh*]

15. As mentioned earlier, the decree of divorce had been passed on 12.12.1988 and the Respondent/Husband contracted the second marriage on 25.07.1989, i.e., after more than seven months.

16.....

17.

18.

19. It has been mentioned earlier that the Respondent/Husband contracted second marriage after more than seven months after the ex parte decree of divorce had been passed. Needless to mention that the Respondent/Husband had no occasion to contemplate the filing of an application under Order 9 Rule 13 of the Civil Procedure Code by his wife. So the second marriage of the Respondent/Husband does not suffer from any illegality whatsoever. There cannot be two valid marriages of a person existing at the same time.

8.1. These decisions are applicable to the facts of this case.

9. The learned counsel for the respondent has submitted the following four decisions, contending that, right accrued to the husband to remarry on the account of exparte decree having been

allowed to become final due to the lapse of appeal time cannot be taken away:-

1) 2014 STPL(Web) 1951 P&H [Lemhmbur Singh v. Kuldeep Kaur]:

18. Learned counsel for the appellant though has vehemently contended that in fact the notice was served at the address, which was known and she was aware of the proceedings, however, the same would be inconsequential as no such presumption can be taken to have arisen. The proceedings and the interim order show that the appellant had not acted with due diligence in pursuing the appeal and serving the respondent. The respondent having solemnized her marriage insofar as the appeal is concerned it has become infructuous. In fact even before the trial Court, he did not lead his evidence and failed to appear which resulted in the petition of the respondent being allowed. Thereafter, he was not vigilant enough in pursuing the appeal. The fact that the learned counsel for the respondent had taken Rs.15,000/- towards litigation expenses is not of much consequence and would not defeat the rights of the respondent. Learned counsel for the respondent has agreed to return

the said amount.

2) *CDJ 2010 MHC 1865=2010(2) CTC 654 [Vijayalakshmi
v. Kannappan]*

13. As per the provision, if a marriage was dissolved by a decree of divorce and when there is no right of appeal or if the time for preferring the appeal is over and if the appeal was dismissed, it shall be lawful for either party to marry again. In the case on hand, after disposal of the appeal on 31.07.2004, after about 16 months, the respondent married for the second time.

18. From the above said decisions, it emerges that a spouse who is successful of having a decree for divorce in his or her favour, has to wait for a statutory period as stipulated in Section 15 of the Hindu Marriage Act and if an appeal is filed beyond the period as contemplated in the provision, the second marriage contracted after such statutory period, cannot be held to be a void one. It is also settled proposition of law that the rights conferred upon a spouse by virtue of Section 15 of the Act cannot be defeated by condoning the delay, when no sufficient cause is shown for the said

purpose.

21. This Court is of the considered view that the reasons assigned in the affidavit are not explained to the satisfaction of the Court and the right lawfully accrued to the respondent cannot be taken away by condoning the delay for which sufficient cause has not been shown. Hence, the petition suffers dismissal.

3) *AIR 2000 AP 451 [Dr.Lokeshwari v. Dr.Srinivasa Rao]*

"33.

The respondent contracted the second marriage only on 24-4-1996 which factor has also not been disputed by the appellant. We are, therefore, of the view, the appeal filed by the appellant in CMA No.1082 of 1996 is also liable to be dismissed on the ground of the respondent contracting second marriage after the expiry of appeal period to which he is legally entitled to. We are not persuaded to accept the view taken by the Kerala High Court in the decision S. V. Suhasini Devi's case cited (supra) that if delay is condoned by the Court, the appeal so filed shall be construed as if it is filed in time and that contracting of second marriage by either spouse after the expiry of the proscribed time,

excluding the time consumed for obtaining the copy of the order, would not have any bearing on the appeal. We may, with great respect to the Division Bench of the Kerala High Court, say, if this view is accepted, a defaulter would ruin the lives of many connected with family life. The Legislature desired, the appeal, if any, to be filed within the prescribed time. Of course, the time consumed for obtaining the copy of the order to be appealed, has to be excluded. There is no excuse for a person if he/she fails to show urgency to pursue the matter. Life is short and things cannot be taken so casually. A party in whose favour a decree is granted must be planning to contract a second marriage. There is no illegality in such a desire. The reasonable time within which appeal is to be filed is provided in the provisions of the Act. The facts in this case disclose that the appellant has deliberately shown the address of the respondent to be at Kavali, though she is aware of the fact that the respondent is working in London. We are, therefore, of the view, such a party cannot be permitted to get away with such a design."

v.Laxmi Narain & Others]:-

12. In the same case, Kitto, J. said "Whatever be the law by which a person's general capacity to marry is to be determined according to the rules applied by the English Courts, if he is a divorced person those Courts will recognize an incapacity to remarry which is imposed upon him by the law of the country in which his former marriage was dissolved, provided that the incapacity is imposed incidentally to the provision of a right of appeal against the judgment of dissolution."

10. When the right to remarry arises, as per law, is the issue that has been addressed in the above decisions.

11. Section 15 of the Hindu Marriage Act, 1955, which deals with right to remarry reads as under:

"when a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree, or if there is such a right of appeal, the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again."

11.1. It is appropriate to highlight the amendment made in Section 15 of the said Act during the year 1976 and the purpose behind this amendment. Before such amendment there was a proviso to the Section, which laid down that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the Court of the first instance.

11.2. The reduction of the waiting period for remarriage by the aforesaid amendment itself suggests that the intention of the legislature is to settle the rights of the Husband and Wife after divorce permanently, at the shortest period of time. In fact, the fate of a couple after divorce should not be kept hanging for a long and indefinite period. Such an uncertainty does not help either of the parties in the marriage in any way. Therefore, the intention of the legislature which encompasses public policy and social interest should also be taken into account.

12. By virtue of the remarriage, now the interest of second wife has intervened and the Court is expected to take cognizance of subsequent event also in deciding the application for restoration / setting aside exparte decree, provided fairness to both side is

observed.

13. It has been held so, in the decision of Hon'ble Supreme Court in AIR 1975 SC 1409 (Venkateswaralu Vs. Motor and General Traders) and the relevant observation reads as under:

"For making the right or remedy, claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed."

14. It would be relevant to consider the case of **Surendra Kumar vs. Krian Devi** reported in **AIR 1997 Raj 63**, where under, it has been held that when there is a valid remarriage and when the right of the second wife intervenes, the petition to set aside the exparte decree cannot be allowed and the observation is thus :

"6. It has not been disputed before me that after passing of the exparte decree in favour of the petitioner by the Distt. Judge on 11-8-1992, the petitioner contracted a second marriage after four months. In such a situation, the important question that arises for determination is whether the ex parte decree can be set aside?"

7. This question arose in [Harjeet Singh v. Guddi's case](#), (1987) 1 Rajasthan LR 520, and it was held by this Court that when second valid marriage is contracted, it is in the interest of justice to dismiss the application for setting aside the ex parte decree for divorce. Again the same question was considered in [Smt. Shimla Devi v. V. Kiran Kumar's case](#), (1994) 3 WLC 519, and it was held that by contracting a second marriage, the interest of second wife intervenes."

15. From the decisions, it is clear that the dismissal of the application to condone the delay is an invited injury by the revision petitioner herself, and, unfortunately the revision petitioner has landed herself in such a position on account of her own conduct of negligence.

16. When this Court pointed out that the claim for alimony under Section 25 of the Hindu Marriage Act, 1955, should be settled, the learned counsel for the respondent submitted that the respondent is paying maintenance to the child and that he is willing to consider the claim for permanent alimony provided an offer is made. Thereafter, there is no progress.

17. In the result, the Civil Revision Petition is dismissed and the order in I.A.No.200 of 2011 dated 05.02.2014 is confirmed.

No costs.

17.03.2016

Index : Yes / No

Web : Yes / No

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S.VIMALA,J.

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To

1. The Sub Court, Tambaram.
2. The Section Officer, V.R.Section, Madras High Court,
Chennai – 600 104

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