

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FAMILY COURT APPEAL NO. 10 OF 2017

Sow. Rekha w/o. Anil Bhosale, .. Appellant
Age. 27 years, Occ. Household,
R/o. At present c/o. Venkatrao Namdeorao
Kamble, At. Devarjan,
Tq. Udgir, Dist. Latur.

Versus

Anil s/o. Gopalrao Bhosale, .. Respondent
Age. 33 years, Occ. Education,
R/o. Bajrang Colony,
Opp. M.G.M. College,
Nanded, Dist. Nanded.

Mr.P.G. Rodge, Advocate for the appellant.
Mr.G.G. Suryawanshi, Advocate for sole respondent.

**CORAM : T.V.NALAWADE &
S.M.GAVHANE, JJ.**

DATED : 07.09.2017

JUDGMENT [PER : S.M. GAVHANE, J.] :-

1. The appellant, wife of the respondent whose Civil Misc.Application No.2 of 2016 filed under section 5 of the Limitation Act for condoning delay of 1 year, 9

months and 24 days caused in filing application for setting aside ex-parte judgment and decree dated 07.05.2014 of divorce passed against her by the Principal Judge, Family Court, Nanded in Petition No. A 159 of 2014 (HMP No.140 of 2013) was rejected by the Judge, Family Court, Nanded, has filed this appeal under section 19 of the Family Courts Act, 1984, challenging the said order, mainly on the ground that she had engaged an Advocate in HMP No.140 of 2013, in the Court of Civil Judge, Senior Division, Nanded, but the said Advocate neither attended the dates of hearing nor filed her say by seeking instructions from her and hence no say order was passed against her. Thereafter, said proceeding was transferred to the Family Court, Nanded and came to be registered as Petition No.A 159 of 2014 and there was no notice of the same to her nor the Advocate appointed by her appeared in the said petition before the Family Court. So also her Advocate did not inform further dates and progress in the matter to her and as such ex-parte judgment and decree was passed against her for no fault of her. Being in

utter disregard to the principles of natural justice, the said judgment and decree requires to be set aside and she deserves to be given an opportunity of contesting the matter by filing her say and leading evidence.

2. The said delay condonation application was resisted by the respondent by filing say at Exh.13. He denied almost all the allegations made against him by the appellant. It was contended that the appellant cannot plead absence of knowledge. The appellant has deliberately not mentioned the date on which she got knowledge of divorce decree. According him, the grounds mentioned in the application are not satisfactory and thus he prayed to reject the application.

3. Considering the evidence adduced by the parties in support of their respective contentions and arguments, application to condone delay was rejected by the impugned order.

4. We have heard the learned advocates appearing for both the sides.

5. As per order dated 03.02.2017, this Court had called for record and proceedings. The record and proceedings in Civil M.A.No.2 of 2016 in which the impugned order was passed, was required to be called by the office. But it appears that the record and proceedings in Petition No.A 159 of 2014, (old HMP No.140 of 2013) (Anil Vs. Rekha) was called and the same was received on 06.03.2017. The Registrar (Judicial) of this Court to bring this fact to the notice of all the concerned to avoid such instance in future.

6. However, as the copies of the impugned order and the application Civil M.A. No.2 of 2016 are filed on record with the appeal, we have perused the same with record and proceedings in Petition No.A 159 of 2014 (Old HMP No.140 of 2013).

7. There is no dispute that the respondent husband had filed HMP No.140 of 2013 against the appellant wife in the Court of CJSD at Nanded on 11.06.2013 and in the said petition, the appellant had appeared through advocate on 24.10.2013 as seen from Roznama in Petition No.A 159 of 2014, when it was pending before the CJSD, Nanded. Thereafter, said petition was transferred to the Family Court, Nanded and it was decided on 07.05.2014. So also there is no dispute that the present appellant/respondent in above said petition had filed application for setting aside ex-parte decree along with Civil M.A.No.2 of 2016 for condoning the delay caused in filing application for setting aside ex-parte decree. The said application to condone the delay was filed on 29.02.2016.

8. On the background of above admitted facts, the only aspect which is required to be considered is whether the appellant/original applicant in the delay condonation application has shown sufficient cause to condone delay

caused in filing application to set aside ex-parte decree. According to appellant, advocate who represented her in the Court of CJSD did not inform her about the dates of hearing and stage in the HMP and so also she had no knowledge of transfer of HMP to the Family Court, Nanded. It appears that she stated the same in her affidavit filed before the Family Court, Nanded in support of the delay condonation application. Of course, she seems to have not filed affidavit of her advocate in support of delay condonation application.

9. The record and proceedings in Petition No. A 159 of 2014 shows that before it was transferred to the Family Court, Nanded from the Court of CJSD, Nanded, it was pending for say of the appellant, who is respondent in the said petition and she was absent. Therefore, in order to give her knowledge of transfer of the said petition from the Court of CJSD, Nanded to the Family Court, Nanded as well as when the establishment of Court of CJSD, Nanded and the Family Court, Nanded are two

different establishments, it was necessary for the transferee Court i.e. Family Court, Nanded to give notice to the present appellant for her appearance before the said Court. Therefore, delay caused in filing application to set aside ex-parte decree on the ground of no notice of transfer of HMP to the Family Court, Nanded to appellant is sufficient to condone the delay.

10. The learned Judge of Family Court while rejecting the delay condonation application, relied upon ratio laid down in the Case of **Ramchandra Nathu Ghadage & Ors. Vs. Rajaram Nathu Ghadage & Ors., 2007(5) Bom.CR 354 (equivalent citation - 2007(5) All MR 175)** and observed that when a case was transferred from one Court to another and the parties are represented by the lawyers notice is not necessary. As per the facts of the above decision, the suit was transferred from the Joint Civil Judge, Junior Division to the 5th Joint Civil Judge, Junior Division at the same station. The defendants had appeared on receipt of summons in the suit on 10.09.1981

through an advocate. It was held that when the transfer of proceeding from one Court to another Court at the same station is done, no notice is required to be given to the parties so long as they have caused their appearance through advocate or in person. The record also indicates that some applications were filed on behalf of the defendants, but no written statement was filed in spite of more than 10 opportunities having been given. In the present case, as observed earlier, when divorce petition was pending before the Civil Judge, Senior Division, Nanded, it was for no say evidence and then it was transferred to the Family Court, Nanded. The transfer of the said petition from the Court of Civil Judge, Senior Division, Nanded to the Family Court, Nanded was not only transfer of petition from one Court to another Court at the same station as per facts of the decision relied upon by the learned Judge of the Family Court, but it was transfer of petition from one Court to another Court having two different establishments. Therefore and when it appears from Roznama in the divorce petition that when

it was transferred to the Family Court, Nanded, it was for no say evidence and the appellant and her advocate were absent, notice of transfer of said application to the appellant/respondent in said petition for appearance before the Family Court, Nanded was necessary and therefore, the ratio laid down in the case of **Ramchandra Nathu Ghagade (Supra)** cannot be suitably made applicable to this case.

11. For the aforesaid reasons, we hold that it is a fit case to condone the delay caused in filing application to set aside ex-parte decree passed in Petition No.A 159 of 2014 by setting aside the impugned order dated 19.12.2016 in Civil M.A. No.2 of 2016 and the said application filed by the appellant needs to be allowed by allowing this appeal. Hence, following order is passed.

12. The appeal is allowed. The order made by Family Court, Nanded in Civil Misc. Application No.2 of 2016 on

Exh.1 is hereby set aside. The application filed for condonation of delay of one year nine months and twenty four days is allowed. The delay is condoned.

[S . M . GAVHANE , J .]

[T . V . NALAWADE , J .]