

IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL REVISION APPLICATION NO.11 OF 2017.

Shri. Shamsunder Miraji Mirajkar
Son of late Miraji Ramji Mirajkar
53 years of age, married,
Resident of H. No.2, 3rd floor,
Yashodan Apartment,
Opp. Vrindavan Gardens,
Varkhandem, Ponda - Goa.

... Petitioner.

Versus

Smt. Shweta Shamsunder Mirajkar
@ Mrs. Aruna Bhausahab Jadhav,
Wife of Shamsunder M. Mirajkar,
Daughter of Bhausahab Jadhav,
Major of age, married, housewife,
resident of c/o. Pratibha B. Jadhav,
Lambahouse, Plot No.301, 3rd floor,
Near Shartiya Bungalow, Hindrapada,
Badlapur, West District, Thane,
Mumbai.

... Respondent.

Mr. G. Teles, Advocate for the Applicant.

Mr. S. Redkar, Advocate for the Respondent.

CORAM:- NUTAN D. SARDESSAI, J.

RESERVED ON:- 30th MARCH, 2017.

PRONOUNCED ON: 6th APRIL, 2017.

ORDER:

The original petitioner before the Court of the Senior Civil Judge, Ponda has challenged in revision the Order dated 26/04/2016 consequent upon which the learned Trial Court

disposed off the composite application for setting aside the ex-parte decree and that for the condonation of delay by the order under challenge and set aside the ex-parte decree in the matrimonial proceedings and simultaneously condoned the delay in maintaining the said application. Being aggrieved by the said order, the original petitioner is in revision assailing the order on grounds that the same was illegal, perverse, untenable in law and liable to be quashed and set aside. The application filed by the respondent under Order IX Rule 13 of CPC was barred by limitation and as such ought to have been accompanied by an application seeking the condonation of delay. The application for setting aside the ex-parte judgment and decree could have been decided on merits only after condoning the delay in filing the application.

2. The Trial Court had passed the impugned order in excess of its jurisdiction and committed a material irregularity in passing a composite order of condoning the delay and setting aside the ex-parte decree. The Trial Court had erred in relying upon the Judgment in “**Davinder Pal Sehgal V/s. Pratap Steel Rolling Mills Pvt.Ltd.**” [2001 (10) SCC 463] inasmuch as the same was not applicable in the facts and circumstances of the

case. Even otherwise, there was a separate application for restoration and for condonation of delay and hence the said case was clearly distinguishable of facts. The applicant had raised preliminary objections to the maintainability of the application filed by the respondent and contended that the same was not maintainable and therefore the Trial Court ought to have decided the same instead of passing the final order on merits under Order IX Rule 13 CPC. The applicant had neither contested nor filed any reply under Order IX Rule 13 CPC on merits considering that he had raised a preliminary objection on the very maintainability of the application. The applicant had been deprived of an opportunity to contest the application under Order IX Rule 13 CPC on merits due to the composite order passed by the Trial Court. Grave prejudice would be caused to him in case the impugned order was not quashed and set aside and hence the revision.

3. Shri G. Teles, learned Advocate for the applicant came to be heard who contended at the outset that the application for setting aside the ex-parte decree dated **30/09/2011** alongwith the ground of condonation of delay was filed on **19/11/2014**. He had raised the preliminary objection to the said application on issue of

notice on **16/01/2016** and thereafter placed his written submissions on record on **01/03/2016** while the respondent had place the written submissions on record dated **05/04/2016** which not only related to the delay but also on the merits of the case. The Trial Court while passing the impugned order was seized of the fact that there was a delay in filing the application for setting aside the ex-parte judgment and decree. Yet, however the learned Trial Court had passed a composite order on merits and delay which was untenable and liable to be quashed and set aside since the applicant was deprived of an opportunity to contest the application on merits moved under Order IX Rule 13 of CPC

4. Mr. Redkar, learned Advocate for the respondent at the outset relied in “**Bhagmal and others v/s. Kunwar Lal and others**” [2010 (12) SCC 159] and submitted that though the applicant had raised preliminary objections to the application for setting aside the ex-parte judgment and decree and for the condonation of delay, no leave whatsoever was sought to file the reply on merits. The Trial Court had duly considered the application and the reply apart from the written arguments and there was no reason why the Trial Court had to assume that the applicant would

have to file a separate reply to the application under Order IX Rule 13 of CPC on merits. It was otherwise his contention that the suit was disposed off by the Trial Court with undue haste within a month and 7 days. Service was effected on the respondent by affixation without the presence of two independent witnesses. Moreover, the respondent had initiated proceedings against the applicant before the Court at Mumbai in 2007 and which were duly pursued by him with full knowledge that the respondent was residing in Mumbai and yet the applicant had effected the service in the matrimonial proceedings on the respondent at an address in **Ponda, Goa**. There was no basis for the applicant to serve the respondent in Goa when he had due knowledge of her residence in Mumbai since around 2007 and which knowledge exposed the malafides of the applicant to snatch an order against her. No case whatsoever was made out to quash the impugned order and therefore the order did not call for an interference in revision.

5. Undisputably the applicant had maintained the matrimonial petition before the Senior Civil Judge at Ponda in which the address of residence was shown at Dhavli, Ponda. Undisputedly the matrimonial proceedings instituted on

24/08/2011 was disposed off on **30/09/2011** i.e. within a month and 7 days thereof. The manner in which the respondent was served raises serious concern inasmuch as there was no particular dispute at the instance of the applicant that she was residing in Mumbai and had even instituted proceedings against him before the J.M.F.C. Ulhasnagar, Thane and contested by him. Be that as it may, the fact remains that the applicant was secured with an ex-parte decree in his matrimonial petition which the respondent sought to set aside by her application under Order IX Rule 13 of CPC incorporating the pleading that she learnt about the ex-parte decree only when she came down to Goa to verify from the Ponda Police as to what action was taken on her complaint made in the month of April, 2014 upon learning that the applicant had disposed off the bungalow without her knowledge and consent. She had set out in her composite application that she had received the copy of the judgment and decree on 16/05/2014 and accordingly moved the Court to set aside the ex-parte judgment and decree after seeking the condonation of delay of five months and 44 days from the date of its knowledge and being on medical grounds.

6. It was undisputed that the applicant on notice raised

preliminary objection to the application under Order IX Rule 13 of CPC filed by the respondent but admittedly he had not sought the leave of the Court to file his objections to the application for setting aside the ex-parte decree in the event the learned Trial Court based on his preliminary objections and the written arguments to that effect could grant him liberty to file his objections to the application under Order IX Rule 13 of CPC on merits. The learned Trial Court had considered the judgment in **Davinder Pal Sehgal** (supra), and held that an application for the condonation of delay under Order IX Rule 9 of CPC was tenable. However, this judgment is clearly distinguishable inasmuch as the party therein had moved an application for restoration as well as the application under Section 5 of the Limitation Act for the condonation of delay in filing the same and had relied upon the contents of the restoration application in that for the condonation of delay. It was not a case where there was a composite application for the restoration of the proceedings and condonation of delay filed as one and decided by the Hon'ble Apex Court. Therefore, there was no basis for the learned Trial Court to hold that it was not necessary to file a separate application for the condonation of delay and an application for setting aside the

ex-parte judgment and decree by placing reliance in **Davinder Pal Sehgal** (supra).

7. The question which would still remain at large is whether an application for setting aside the ex-parte decree and that for the condonation of delay could be maintained as a composite application and whether there was any error committed by the learned Trial Court in disposing off the application in the manner it did in the facts and circumstances of the case.

8. In **Bhagmal** (supra), a suit was filed by the respondents against the petitioner's father for a declaration of title, possession and permanent injunction against the appellants/defendants in respect of the house in dispute. The Court proceeded ex-parte and the decree came to be passed which allegedly came to the notice of the appellant when the execution proceedings were initiated and they moved an application under Order IX Rule 13 CPC for setting aside the ex-parte decree. According to the appellants this application was moved within 30 days from the date of their knowledge of the ex-parte decree. There was a compromise effected on 10/12/1983, which was an out-of-Court settlement,

wherein it was agreed between the parties that the respondent No.1/plaintiff would withdraw the suit on that count. In view of the said understanding, the appellant had not attended the further hearings and the respondent No. 1/plaintiff continued surreptitiously and therefore they could not know about the ex-parte order and the decree passed against them since the application was moved within 30 days from the knowledge, and a separate application for the condonation of delay was not required. Be that as it may, the application under Order IX Rule 13 CPC was dismissed by the Trial Court holding that it was barred by limitation and challenged in Appeal before the District Judge, Bhopal alongwith the application for the condonation of delay under Section 5 of the Limitation Act. The District Court, Bhopal allowed the application under Order IX Rule 13 CPC and held that the Trial Court had erred in law in not allowing the application with a direction to the Trial Court to decide the case on merits.

9. In **Bhagmal** (supra), a revision came to be filed under Section 115 CPC before the High Court which took the view that the application filed by the appellants/defendants under Order IX Rule 13 CPC was barred by time and the appellate Court had not

recorded any finding on the question as to whether the filing of the application under Section 5 of the Limitation Act was necessary or not and, therefore, the appellate Court had exceeded its jurisdiction in allowing the application without condoning the delay. On that count, the impugned order of the appellate Court was set aside and that of the Trial Court was restored. The Hon'ble High Court in its opinion held that the High Court was not justified in taking a hypertechnical view on perusing all the orders. It was clear from the Trial Court's order that the Trial Court had entertained the application on merits and had undoubtedly referred to the reply of the respondents to the effect that the application for setting aside the ex-parte decree was beyond limitation. The view taken by the Trial Court was based more on the merits and in fact, it went on to record the finding that there was no compromise and the theory of compromise and delay on account of that was not acceptable.

10. In Bhagmal(supra), the Hon'ble Apex Court further observed that the question of filing an application under Order IX Rule 13 CPC was, in their opinion, rightly considered by the appellate Court on merits and the appellate Court was absolutely

right in coming to the conclusion that appellants/defendants were fully justified in filing the application under Order IX Rule 13 CPC at the time when they actually filed it and the delay in filing the application was also fully explained on account of the fact that they never knew about the decree and the orders starting the ex-parte proceedings against them. Under such circumstances, the High Court should not have taken the hyper-technical view that no separate application was filed under Section 5 of the Limitation Act. The application under Order IX Rule 13 CPC itself had all the ingredients of the application for the condonation of delay in making that application and that procedure was also the handmaid of justice and in those circumstances allowed the appeal, setting aside the judgment of the High Court and restoring that of the appellate Court. This judgment clearly lays down the proposition that insisting on a separate application for the condonation of delay is not mandatory in as much as the application for setting aside the ex-parte judgment and decree itself contains the necessary averments in that regard.

11. Coming back to the facts of our case although it has been the consistent plea of Shri G. Teles, learned Advocate for the

petitioner that he had raised preliminary objections and buttressed the same in his written submissions and that the Trial Court ought to have made a separate order, the fact of the matter remains on a reading and construction of the impugned order that the learned Trial Judge was not oblivious of the fact that the application moved by the respondent for setting aside the ex-parte judgment and decree contained averments regarding the delay and that she was also seeking the condonation of delay simultaneously. Therefore, it cannot be heard on behalf of the applicant that he had been denied an opportunity to deal with the application on merits merely so considering the fact that neither in his preliminary objections nor in the written synopsis had he sought the leave of the Court to file his reply, on merits. I find myself in agreement with the contention of Shri S. Redkar, learned Advocate for the respondent as to why the Court should have assumed that the applicant would file a separate reply to the application under Order IX Rule 13 of CPC on merits. In that context, the Trial court proceeded to infer that the applicant had admitted the pleadings of the respondents on merits in the absence of any proper verification of his reply and come to a finding that the respondent had duly accounted for the delay in filing the application for setting

aside the ex-parte judgment and decree and to set aside the ex-parte decree allowing the respondent to participate in the proceedings from the stage where she was set ex-parte. In any event and without any undue repetition, the applicant had obtained the judgment and decree in the matrimonial petition with undue haste and where a serious question arose whether the respondent had at all been served in the proceedings. The prejudice which is canvased on behalf of the applicant in case he has to suffer the impugned order is miniscule compared to the prejudice and the hardship which the respondent would have to suffer qua the ex-parte judgment and decree in the matrimonial proceedings against her. i, therefore, do not find any merit in the petition and hold that there is no justification to quash and set aside the impugned order. In the result, i do not find any jurisdictional error in the impugned order requiring interference.

12. The civil revision application is without any merit and is accordingly dismissed, with no order as to costs.

NUTAN D. SARDESSAI, J.

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