

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO. 262 OF 2016  
IN  
FAMILY COURT APPEAL NO. 133 OF 2016**

**Mr. Al Farook Kably**

**..Applicant.**

**Vs.**

**Zain Kably.**

**..Respondent.**

**Applicant in person present.**

**Mrs. Mrunalini Deshmukh a/w. Mr. A. Dasgupta a/w. Mr. Shrey Shah i/b.  
M/s. Jhangiani, Narula & Associates, advocate for the Respondent.**

**CORAM : R. M. SAVANT, J &  
SMT.SADHANA S. JADHAV,J  
DATE : 12<sup>th</sup> JUNE, 2017**

**P.C.**

1 The above Civil Application has been filed seeking condonation of delay of about 924 days in filing the above Family Court Appeal arising out of the Judgment and Order dated 11<sup>th</sup> December, 2013 passed by the Family Court, Mumbai. By the said order, the Marriage Petition filed by the Respondent for divorce came to be allowed, whereas the Application filed by the Appellant for restitution of conjugal rights came to be rejected. The order, as is originally passed, also grants an injunction against the Appellant and in favour of the

Respondent, in so far as the matrimonial home in the building Sagar Sangeet at Colaba is concerned. The Application for condonation of delay is founded on the grounds which are mentioned in the Civil Application. The grounds are revolving on the fact that the applicant has no wherewithal to engage an advocate to file an Appeal, as his attempt to engage an advocate could not fructify on account of the alleged financial stringencies that the Appellant is facing. The ground is also made out that the Appellant had suffered an heart attack in the year 2014, for which has was hospitalised, on account of which also delay in filing the Appeal has occurred. The above Appeal was ultimately filed on 27/7/2016. It is the case of the Appellant that the alongwith the Appeal an Application for condonation of delay was proposed to be filed. However, it is his case that the office did not accept the same as according to the office, there was no delay in filing the Appeal considering the fact that the Family Court had modified its Judgment and Order dated 11<sup>th</sup> December, 2013 by its order dated 25<sup>th</sup> May, 2016.

2 In so far as the said modification of order is concerned, it is required to be noted that the Respondent after obtaining the certified copy of the Judgment and Order passed by the Family Court, filed Miscellaneous Application in February, 2014, so as to get incorporated in the operative part of

the impugned order the injunction restraining the Appellant from “entering into” the matrimonial home i.e. the flat in Sagar Sangeet, Colaba, Mumbai. This Application was made in view of the fact that though in the body of the said order, the said fact has been alluded to, the said fact did not find a mention in the operative part of the impugned order, so as to restrain the Appellant from entering into the matrimonial house. The said Application came to be allowed by the Family Court by order dated 25<sup>th</sup> May, 2016 and the words “entering into” were directed to be incorporated in the operative part of the original Judgment and Order dated 11<sup>th</sup> December, 2013. Hence, in terms of the order dated 25<sup>th</sup> May, 2016, the Judgment and Order dated 11<sup>th</sup> December, 2017 passed by the Family Court came to be modified in so far as the operative part is concerned. The above Appeal had come up for admission before the Division Bench of this Court when it seems that an objection was raised on behalf of the Respondent on the ground that the Appeal being delayed having regard to the fact that it was filed in the year 2016 when the original order is dated 11<sup>th</sup> December, 2013. The Division Bench of this Court by an order dated 25<sup>th</sup> August, 2016 therefore, granted liberty to the Appellant to consider filing an application for condonation of delay in the context of the fact that the original order was passed on 11<sup>th</sup> December, 2013. That is how the instant Civil Application has now been filed seeking

condonation of delay of about 924 days in filing the above Family Court Appeal.

3 On behalf of the Respondent an affidavit-in-reply has been filed dealing with the claims and contention raised in the above Civil Application. To the said reply, orders passed by the Family Court in the year 2014 and 2015 have also been annexed. This is in support of the case of the Respondent that the Appellant was not suffering from any debilitating, illness which prevented him from filing the Family Court Appeal in this Court against the order dated 11<sup>th</sup> December, 2013.

4 The Appellant who appears in person had sought to tender synopsis of his arguments in the above Civil Application. However, in view of the fact that what had transpired between the Counsel who the Appellant was desirous of engaging and the Appellant in the matter of professional fees was sought to be referred to, we had refused to accept the said synopsis and returned the same to the Appellant.

5 Heard the Appellant in person and the learned Counsel Ms. Deshmukh appearing for the Respondent. The Appellant reiterated the case as is urged in

the Civil Application for seeking condonation of delay. Per contra, the learned Counsel Mrs. Deshmukh would contend that having regard to the fact that there is delay of 924 days, for which there is no justifiable reason, as the Appellant has been prosecuting other applications in various other courts. Having regard to the conduct of the Appellant, it was the submission of the learned Counsel that no indulgence by way of exercise of any discretion could be shown to the Appellant.

6 Having heard the Appellant in person and the learned Counsel for the Respondent, in our view, case for exercise of the discretion in the matter of condonation of delay of 924 days is made out. It is required to be noted that the Family Court had decided the Marriage Petition filed by the Respondent as well as the Application for restitution of conjugal right filed by the Appellant by common Judgment and Order dated 11/12/2013. In the context of the present Application, clause 4 of the operative part of the said Judgment and Order dated 11<sup>th</sup> December, 2013 assumes importance and therefore, reproduced hereinunder:-

“4. The respondent Al Farook is also perpetually restrained from disturbing the petitioner Zain's possession over the matrimonial home i.e. 30A, Sagar Sangeet Bldg., Shahid Bhagat Singh Road, Colaba,

Mumbai 400 005.”

Hence by clause 4 the Appellant was restrained from disturbing the Respondent's possession over the matrimonial house. However, by the modification carried on 25<sup>th</sup> May, 2016, what has been done by the Family Court is to restrain the Appellant from entering into the matrimonial house. Hence, the injunction granted by the Family Court as is originally granted by the Family Court has been widened by the Family Court, which correction was carried out on 25<sup>th</sup> May, 2016.

7 This Court does not deem it appropriate to go into the aspect whether such correction could have been carried out by taking recourse to Section 152 of the Civil Procedure Code, as this Court is not required to do the same in the present proceedings. But the fact remains that a substantial modification was carried out to the operative part of the impugned order in so far as the grant of injunction is concerned. Hence, though the above Family Court Appeal was filed on 27/7/2016, however, if considered in the context of the fact that the original Judgment and Order is modified on 25<sup>th</sup> May, 2016, the Appeal can be said to be filed in time. Even having regard to the fact that the original order dated 11<sup>th</sup> December, 2013 is now challenged, the reasons put forth by the

Appellant can be said to be the plausible reasons for the delay of over 3 years, having occurred in the filing of the Appeal. It is required to be borne in mind that the proceedings in question being matrimonial in nature, a highly technical and pedantic view is required to be avoided and a view which would give a change to adjudicate the matter on merits is required to be adopted. In our view, therefore, discretion is required to be exercised in favour of the Appellant by condoning the delay in filing the Appeal.

8 The Civil Application is accordingly allowed. The delay in filing the Appeal stands condoned. In the facts and circumstances of the case, the Appellant to pay costs of Rs. 5,000/- to be deposited with the Maharashtra Legal Aid Fund within two weeks from date. On payment of the said costs, the Appeal would be taken up for admission after four weeks. The Appellant to produce the evidence of payment of the said costs. Civil Application is accordingly disposed of.

**[SMT.SADHANA S. JADHAV,J]**

**[R.M.SAVANT, J]**