

Reserved on : 22.06.2017

Pronounced on : 29-06-2017

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C.M.P. Nos. 11836 and 11837 of 2016
in
C.M.A. SR Nos. 43642 and 47492 of 2016

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R. SUBBIAH, J

and

M.S. RAMESH, J

(Order of the Court was made by R. SUBBIAH, J

C.M.P. No. 11836 of 2016 in CMA SR No. 43642 of 2016 has been filed to condone the delay of 2 days in filing the appeal against the order and decree dated 19.02.2016 made in O.P. No. 1736 of 2003 on the file of the learned III Additional Principal Family Court, Chennai. By the said order dated 19.12.2016, the Family Court allowed the Original Petition filed by the respondent seeking for dissolution of the marriage solemnised between him and the respondent on 24.07.2001.

2. C.M.P. No. 11837 of 2016 in CMA SR No. 47492 of 2016 has been filed to condone the delay of 88 days in filing the appeal against the order and decree dated 19.02.2016 made in I.A. No. 2631 of 2011 in I.A. No. 1607 of 2016 in O.P. No. 1736 of 2003 on the file of the learned III Additional Principal Family Court, Chennai. By the said Order dated 19.02.2016 in IA No.2 631 of 2017,

3. The petitioner in these Miscellaneous Petitions was the wife. The respondent in both these petitions was the husband. The respondent herein has filed O.P. No. 1736 of 2003 before the Family Court seeking for grant of a decree of divorce dissolving the marriage solemnised between him and the petitioner on

24.07.2001 on the ground of cruelty. By order dated 19.02.2016, the Family Court allowed the Original Petition filed by the respondent herein by granting a decree of divorce. Immediately, the petitioner has filed copy application on 22.02.2016 as 20.02.2016 and 21.02.2016 happened to be Saturday and Sunday. Therefore, on the next working day namely 22.02.2016, the petitioner has filed the copy application. The copy of the order dated 19.02.2016 passed in OP No. 1736 of 2003 was made ready and delivered to the petitioner on 20.05.2016. After obtaining the copy application, the petitioner contacted her counsel to prefer an appeal against the order dated 19.02.2016 in OP No. 1736 of 2003. Thus, there was two days delay in filing the appeal against the order dated 19.02.2016 passed in OP No. 1736 of 2003 and therefore the petitioner has filed the above CMP No. 11836 of 2016.

4. CMP No. 11837 of 2016 has been filed to condone the delay of 88 days in filing an appeal against the order dated 19.02.2016 passed in I.A. No. 2631 of 2011 in I.A. No. 1647 of 2006 in O.P. No. 1736 of 2003. I.A. No. 2631 of 2011 has been filed by the petitioner under Section 24 of The Hindu Marriage Act for enhancing the monthly maintenance fixed in I.A. No. 1647 of 2006 in O.P. No. 1736 of 2003 to Rs.20,000/- per month pending disposal of the Original Petition. The said Petition in I.A. No. 2631 of 2011 was allowed enhancing the monthly maintenance from Rs.5,000/- to Rs.9,000/- per month.

5. When the Miscellaneous Petitions were taken up for hearing, the learned counsel for the petitioners would contend that the delay of 2 days in filing the appeal against the order 19.02.2016 allowing the Original Petition as well as

the Order dated 19.02.2016 enhancing the maintenance amount cannot be construed as an inordinate and the reason for the delay has been properly explained by the petitioner. Therefore, the learned counsel for the petitioner would pray this Court to condone the delay in filing the appeal so as to enable the petitioner to prosecute the appeal.

6. On the other hand, the learned counsel appearing for the respondent vehemently opposed the petitions for condoning the delay by stating that after the Family Court allowed the Original Petition, the respondent waited for 90 days from the date of receipt of the copy of the order, but he did not receive any intimation from the petitioner with regard to the filing of the appeal. Since no appeal has been preferred by the petitioner till 28.07.2016, the respondent got married to one Saranya on 29.07.2016 at Selva Vinayagar Alayam, M.R.H. Road, Madhavaram, Chennai and subsequently the marriage was also registered at the office of the Sub-Registrar, Madhavaram in Serial No.143 of 2017. Since already the respondent got married with another lady after expiry of the statutory period for preferring an appeal, even if the delay is condoned and the appeals are taken up for hearing, no useful purpose would be solved. It is further submitted that the respondent has filed the Original Petition during the year 2003. Both the respondent and the petitioner were living separately for the past 16 years. The petitioner has filed a Petition for restitution of conjugal rights in O.P. No. 3041 of 2012 after 9 years from the date of filing of the Original Petition by the respondent herein. There is no children born out of the wedlock between the petitioner and the respondent. The scope for re-union between the petitioner and the respondent has irretrievably broken. While so, according to the counsel for the respondent, there is

no scope for re-union. Further, at the time when the Original Petition was filed, the respondent was 33 years and the respondent is now 48 years old. The appeals have been filed only to harass the respondent. As regards the appeal filed as against the order enhancing the maintenance amount, the application was filed under Section 24 of Hindu Marriage Act seeking pendente lite litigation. During the pendency of the Original Petition, the respondent has paid the entire arrears of maintenance calculating the enhanced amount to the tune of Rs.2,48,000/-. When the Original Petition itself was allowed dissolving the marriage, the appeal filed as against the order enhancing the maintenance amount has become infructuous. It is also contended by the counsel for the respondent that the petitioner has not explained the reasons for the delay and the reasons assigned by her are vague and bald and on this ground alone, the petitioners for condonation of delay are liable to be dismissed. The learned counsel for the respondent therefore submits that nothing survives for adjudication in the appeals and therefore, the petitions for condonation of delay are liable to be dismissed.

7. The learned counsel for the respondent also relied on the decision of the Honourable Supreme Court in the case of **(N. Balakrishnan vs. M. Krishnamurthy)** reported in **AIR 1998 Supreme Court 3222** to condont that the length of delay is no matter, but acceptability of the explanation is the only criterion. In Para No.9 of the said decision, it was held as follows:-

“9. It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned a the explanation thereof is satisfactory. Once the Court

accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior Court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone the delay. In such cases, the superior Court would be free to consider the cause shown for the delay afresh and it is open to such superior Court to come to its own finding even untrammelled by the conclusion of the lower Court.

8. By relying upon the above decision, the learned counsel for the respondent submits that merely because the delay is meager, it is not necessary that the delay has to be condoned, rather, the explanation offered by the petitioner has to be looked into. Unless this Court satisfied with the reasons assigned by the petitioner, the delay cannot be condoned automatically.

9. In reply, the learned counsel for the petitioner would contend that at the time of considering the application for condonation of delay, the merits of the appeals need not be gone into by this Court. In this petition, this Court has to consider whether sufficient cause has been shown for condoning the delay in filing the appeals or not. If the explanation offered by the petitioner is satisfactory, notwithstanding the merits of the appeal, the petitions for condonation of delay have to be allowed. It is further stated that the delay has been properly explained by the petitioner in this case besides that the delay is not inordinate. Therefore, the learned counsel for the petitioner prayed for allowing both the petitions.

10. The learned counsel for the petitioner relied on Section 19 (1) of The Family Court Act which provides 30 days for filing an appeal from the date of order. As per Section 24 (4) of Hindu Marriage Act, the period prescribed for filing an

appeal is 90 days from the date of order. In this regard, the learned counsel for the petitioner relied on the Full Bench decision of the Bombay High Court in the case of **(Shivram Dodanna Shetty vs. Sharmila Shivram Shetty)** reported in **(2017) 1 Mh.L.J Page No.281** wherein it was held that for an appeal filed under Sub-section (1) of Section 19 of the Family Courts Act, 1984, period of limitation prescribed under Sub-Section (4) of Section 28 of Hindu Marriage Act, shall apply. Therefore, on the basis of the decision of the Bombay High Court, the appeals have been filed by the petitioner within the period of limitation and therefore also he prayed for allowing the petitions for condonation of delay.

11. We have carefully considered the submissions of the counsel for both sides and perused the materials placed on record. As far as the Petition filed for condoning the delay of two days in filing the appeal, against the order dated 19.02.2016 passed in the Original Petition, it is stated that on the date of deliverance of the order namely 19.02.2016, the petitioner could not file the copy application and the next two days namely 20.02.2016 and 21.02.2016 happened to be Saturday and Sunday respectively. After obtaining the certified copy of the order dated 19.02.2016, the appeal in CMA SR No. 43642 of 2016 was filed on 01.07.2016 with a delay of two days in filing the same. Similarly, the other appeal in CMA SR No. 47492 of 2016 has been filed with a delay of 88 days in filing the same. For the delay of 88 days in filing this appeal, it was explained that only on 25.05.2016 when the petitioner appeared before the Court in connection with the case in O.P. No. 3041 of 2012 filed by her for restitution of conjugal rights, did she came to know that the petition filed by her for enhancement of maintenance was also allowed along with the Original Petition by enhancing the maintenance amount

from Rs.5,000/- to Rs.9,000/-. Thereafter, she filed the appeal with a delay of 88 days in filing the appeal. Thus, according to the petitioner, the delay in filing the appeals is neither wilful nor wanton and therefore, the petitions for condonation of delay have to be allowed.

12. It is evident that the petitioner has assigned justifiable reasons for condoning the delay in filing the appeals. Further, we find that the delay in filing the appeals is not inordinate and therefore, we are inclined to condone the delay. As rightly pointed out by the learned counsel for the petitioner, while considering an application for condonation of delay, the contentions with regard to the merits of the appeals need not be gone into by this Court. As we are satisfied with the reasons assigned by the petitioner for condonation of the delay in filing the appeals, without going into contentions with regard to the merits or otherwise of the appeals, we are of the view that the petitions for condonation of delay have to be allowed.

13. Accordingly, both the Civil Miscellaneous Petitions are allowed.

(R.P.S.J.,) (M.S.R.J.,)

29-06-2017

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Speaking / Non-speaking Order

Note : Office is directed to number the appeal, if it is otherwise in order, and post it on 06.07.2017 for admission.

To

Presiding Officer
III Additional Principal Family Court
Chennai

R. SUBBIAH, J
and
M.S. RAMESH, J

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Pre-delivery common order in
CMP Nos. 11836 & 11837/2016
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29-06-2017