

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

**CM No. 10505-CII of 2017 in/and
FAO No. 3205 of 2017 (O&M)**

Date of Decision: 10.5.2017

Sarabkaur

....Appellant

Versus

Sandeep Kharb and others

...Respondents.

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU.**

PRESENT: Mr. Sumit Sangwan, Advocate for the appellant.

AJAY KUMAR MITTAL, J.

1 By way of present appeal, the appellant has challenged the judgment and decree dated 18.9.2014 passed by the District Judge (Family Court), Bhiwani whereby the petition filed by her under Section 6 of the Hindu Minority and Guardianship Act, 1956 (in short “the Act”) for custody of the minors, namely, Kunjal, aged 6 years and Shiksha, aged 4 years born from the wedlock of Ruchika (deceased daughter of the appellant) and respondent No.1, was dismissed.

2. The facts necessary for adjudication of the present appeal as narrated therein may be noticed. Ruchika daughter of the appellant was married with respondent No.1 on 29.4.2004 at Charkhi Dadri, according to Hindu rites and ceremonies and from the said wedlock, minors Kunjal and Shiksha were born on 7.6.2005 and 11.5.2007, respectively. In the marriage more than ₹ 15 lakhs were spent and sufficient dowry was given. Ruchika

was maltreated and harassed by the respondents and after the birth of her first child on 7.6.2005, she was given merciless beatings and was turned out of the matrimonial home after keeping the child with them. On 29.10.2007, respondent No.1 made a telephonic call to Ruchika that her younger daughter had been killed and he would also kill the other daughter as well as her and would remarry with some other lady. Due to mental shock, Ruchika committed suicide by sprinkling kerosene oil on her body and she died on 6.11.2007 due to burn injuries. After her death, respondent No.1 performed second marriage with respondent No.2. On knowing about the said marriage, the appellant visited the house of the respondents to bring the second child of Ruchika so that both the children be brought up but they refused to hand over her custody. On 3.5.2010, respondents No.1, 3 and 4 came to the house of the appellant and forcibly took minor Kunjal with them and since then she is in the custody of the respondents. The respondents are not taking care of the children and respondent No.2 who is the step mother of the minors used to give merciless beatings to the minors. Accordingly, the appellant filed a petition under Section 6 of the Act for custody of the minors. The respondents contested the said petition by filing written statement. It was pleaded therein that respondent No.1 being the father and natural guardian of the minors had also preferential right in the interest and welfare of the minors. The minors were looked after by the respondents with full love and affection. The appellant who is an old lady, is not in a position to provide maintenance as well as better education. The welfare of the children is with the respondents and respondent No.1 had a right to have his children brought up in his own religion, both during his life time and after his death. Further, the respondents were financially sound in

comparison to the appellant. The other averments made in the petition were denied and a prayer for dismissal of the same was made. From the pleadings of the parties, the trial Court framed the following issues:-

1. Whether the petitioner is entitled to custody of minors Kunjal and Shiksha, on the grounds as alleged? OPP
2. Whether the petitioner has no locus standi to file the present petition? OPR
3. Whether the petitioner has no cause of action to file the present petition? OPR
4. Whether the petition is not maintainable in the present form? OPR
5. Whether the court has no jurisdiction to try and decide the present petition? OPR
6. Relief.

3. In support of their case, the parties led their respective evidence. The trial Court took issues No.1 and 5 together being interconnected and decided the same against the appellant and in favour of the respondents holding that the welfare of the minor children was better with the respondents than the appellant. The appellant was held not entitled to the custody of the minor children. The other issues were decided in favour of the respondents. Accordingly, the trial Court vide judgment and decree dated 18.9.2014 dismissed the petition filed under Section 6 of the Act. Hence, the present appeal. Since the appeal is barred by time, an application under Section 14 read with Section 5 of the Limitation Act, 1963 (for brevity "1963 Act") for condonation of 932 days' delay and

exclusion of time has been filed.

4. We have heard learned counsel for the appellant.

5. The primary and foremost question that arises for consideration in this appeal is whether there is sufficient cause for condonation of colossal delay of 932 days in filing the appeal before this Court. Equally, another question would be whether any case for exclusion of time under Section 14 of the 1963 Act has been made out or not.

6. Examining the legal position relating to condonation of delay under Section 5 of the 1963 Act, it may be observed that the Supreme Court in **Oriental Aroma Chemical Industries Ltd. v. Gujarat Industrial Development Corporation and another, (2010) 5 SCC 459** laying down the broad principles for adjudicating the issue of condonation of delay, in paras 14 & 15 observed as under:-

“14. We have considered the respective submissions. The law of limitation is founded on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time.

15. The expression “sufficient cause” employed in Section 5 of the Indian Limitation Act, 1963 and similar other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which sub serves the ends of justice. Although, no hard and fast rule can be laid down in dealing with the applications for condonation of delay, this Court has justifiably advocated adoption of a liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate-Collector (L.A.) v. Katiji N. Balakrishnan v. M. Krishnamurthy and Vedabai v. Shantaram Baburao Patil.”

7. It was further noticed by the Apex Court in **R.B. Ramlingam v. R.B. Bhavaneshwari 2009(1) RCR (Civil) 892** as under:-

“.....It is not necessary at this stage to discuss each and every judgment cited before us for the simple reason that Section 5 of the Limitation Act, 1963 does not lay down any standard or objective test. The test of “sufficient cause” is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of limitation has left the concept of “sufficient cause” delightfully undefined, thereby leaving to the Court a well-intentioned discretion to decide the individual cases whether circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are never

exhausted. Each case spells out a unique experience to be dealt with by the Court as such.”

It was also recorded that:-

“For the aforestated reasons, we hold that in each and every case the Court has to examine whether delay in filing the special leave petition stands properly explained. This is the basic test which needs to be applied. The true guide is whether the petitioner has acted with reasonable diligence in the prosecution of his appeal/petition....”

8. From the above, it emerges that the law of limitation has been enacted which is based on public policy so as to prescribe time limit for availing legal remedy for redressal of the injury caused. The purpose behind enacting law of limitation is not to destroy the rights of the parties but to see that the uncertainty should not prevail for unlimited period. Under Section 5 of the 1963 Act, the courts are empowered to condone the delay where a party approaching the court belatedly shows sufficient cause for not availing the remedy within the prescribed period. The meaning to be assigned to the expression “sufficient cause” occurring in Section 5 of the 1963 Act should be such so as to do substantial justice between the parties. The existence of sufficient cause depends upon facts of each case and no hard and fast rule can be applied in deciding such cases.

9. The Apex Court in **Oriental Aroma Chemical Industries Ltd. and R.B. Ramlingam's cases (supra)** noticed that the courts should adopt liberal approach where delay is of short period whereas the proof required should be strict where the delay is inordinate. Further, it was also observed

that judgments dealing with the condonation of delay may not lay down any standard or objective test but is purely an individualistic test. The court is required to examine while adjudicating the matter relating to condonation of delay on exercising judicial discretion on individual facts involved therein. There does not exist any exhaustive list constituting sufficient cause. The applicant/petitioner is required to establish that inspite of acting with due care and caution, the delay had occurred due to circumstances beyond his control and was inevitable.

10. According to the learned counsel for the appellant, on 21.10.2014, the counsel appearing before the trial Court misguided the appellant to file a petition under Section 13 of the Act to allow the children to visit the appellant's house in long vacation including visiting rights. The said petition was withdrawn on 10.3.2017 (Annexure A-1), when the Court asked him to file an appeal against the judgment and decree dated 18.9.2014 instead of filing the petition under Section 13 of the Act. It was thereupon that the counsel informed the appellant that she should file the appeal against the impugned judgment. Thereafter the appellant approached the present counsel on 8.4.2017 for filing the appeal. Due to vacation in this Court, the appeal could not be filed. On 24.4.2017, the appellant again approached the counsel who demanded the complete brief of the trial Court. The appellant handed over the brief along with documents to the counsel on 3.5.2017 and the present appeal was filed. Since the appeal was barred by time, an application bearing CM No. 10505-CII of 2017 for condonation of 932 days' delay under Section 14 read with Section 5 of the 1963 Act has been filed. It was urged that the delay, if any, has occurred in the aforesaid circumstances in filing the appeal before this Court. Learned counsel further

argued that the delay was unintentional and due to the circumstances beyond the control of the appellant.

11. Adverting to the factual matrix in this case, we do not find any merit in the application for condonation of delay under Section 5 of the 1963 Act or for exclusion of time under Section 14 of the 1963 Act. The question regarding whether there is sufficient cause or not depends upon each case and primarily is a question of fact to be considered taking into account totality of events which had taken place in a particular case. In the present case after appreciating the matter it cannot be said that there was sufficient cause for condonation of delay. The appellant along with Rajender Singh had filed the petition under Section 13 of the Act seeking Court's intervention to allow children to visit them in long vacations and visiting right at their residence to meet children in the welfare of minor female children as is discernible from perusal of order, copy of which has been appended as Annexure A-1 with the appeal. The said petition was withdrawn on 10.3.2017. It would be expedient to refer to Section 13 of the Act which reads thus:-

“13. Welfare of minor to be paramount consideration.”-(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the

welfare of the minor.”

A plain reading of the aforesaid provision clearly spells out that for appointment or declaration of any person as guardian of a Hindu minor, the welfare of the minor is to be of paramount consideration. Further, the court is empowered to deny guardianship to any person wherever it is found not to be for the welfare of the minor. This provision only declares that welfare of minor is to be of paramount consideration while adjudicating the custody but does not confer any substantive right in favour of any party. Under the circumstances, in the absence of conferment of substantive right by the provision, no petition thereunder was maintainable. Thus, it cannot be said that the counsel for the appellant had bonafidely formed an opinion that instead of challenging the impugned order within limitation seeking visitation rights, it would be appropriate to file petition under Section 13 of the Act which was not maintainable. Neither any affidavit of the said counsel has been filed nor it has been suggested in the application seeking condonation or exclusion of time that any action has been taken against him for misguiding the appellant. The plea taken for seeking condonation of delay, thus, cannot be held to be genuine and bonafide and, therefore, the period spent could not be excluded for computing limitation for filing of appeal. The appellant filed the appeal before this Court after an inordinate delay of 932 days. It is, thus, concluded that the plea of the appellant would not satisfy the test of sufficient cause.

12. In view of the above, we do not find any merit in the application for condonation of 932 days' delay under Section 5 of the 1963 Act or for exclusion of time under Section 14 of the 1963 Act in filing the appeal.

13. Consequently, the application for condonation of delay under Section 14 read with Section 5 of the 1963 Act is hereby dismissed and as a sequel, the appeal is also rejected.

14. This order shall also dispose of CM-10507-CII-2017.

(AJAY KUMAR MITTAL)
JUDGE

May 10, 2017
gbs

(HARINDER SINGH SIDHU)
JUDGE

Whether Speaking/Reasoned

Yes

Whether Reportable

Yes