

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11273 OF 2018

Smita Deepak Khilari ... Petitioner
Vs.
Deepak Nivrutti Khilari ... Respondent

Ms Anita M. Bafna for Petitioner.
Mr. Shanay Shah i/b. Ms Sapana Rachure for Respondent.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 25, 2018

P.C. :

Heard Ms Bafna, learned Counsel for the petitioner and Mr. Shah, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the order dated 24.05.2018 passed by the learned Judge, Family Court, Thane in Petition No.CMA 1 of 2016. By that order, the learned Judge rejected the application made by the petitioner-wife under Section 5 of the Limitation Act, 1963 for condonation of delay of 145 days in filing application for setting aside ex-parte decree dated 18.08.2015 passed in Petition No.A-47 of 2013 and D-6 of 2012.

3. Rule. Ms Rachure waives service for the respondent. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing. The relevant and material facts for disposal of the present Petition, briefly stated, are as under:

4. Petition No.A-47 of 2013 was filed by the respondent for restitution of conjugal rights under Section 9 of the Hindu Marriage Act,

1955 (for short 'Act'). Petition No.D-6/12 is filed by the respondent for custody of minor child. It appears that by order dated 18.08.2015, both these Petitions were decreed. The petitioner has taken out application on 11.01.2016 for condonation of delay of 145 days in filing the application under Order IX, Rule 13 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for setting aside common ex-parte decree dated 18.08.2015 passed in these proceedings. By the impugned order, the learned Judge has rejected the application with costs of Rs.3,000/- with further direction that the costs shall be paid within 15 days from the date of the order.

5. In support of this Petition, Ms Bafna submitted that the learned Judge was not justified in dismissing the application for condonation of delay having regard to the fact that the delay is of 145 days. The learned Judge, while dismissing the application, also imposed costs of Rs.3,000/- to be paid within 15 days. She submitted that it is settled principle of law that while considering the application for condonation of delay, the Court has to adopt liberal approach. By not condoning the delay, the proceedings under Order IX, Rule 13 of C.P.C. stand dismissed on technical ground and not on merits. By order dated 18.08.2015, the learned Judge has decreed both the Petitions and directed the petitioner herein to resume cohabitation along with the minor child.

6. On the other hand, Mr. Shah supported the impugned order. He has taken me through the averments made from paragraphs 11 to 16 of the application as also paragraph 6 onwards of the impugned order. He further submitted that having regard to the conduct of the petitioner, no case is made out for interfering with the impugned order. He submitted that in fact, the respondent was aware of pendency of proceedings and had filed application dated 29.12.2014 for certified copies of all the

exhibits with orders. She also noted in handwriting that the next date of hearing is 28.01.2015. He further submitted that though it is settled principle of law that application for condonation of delay has to be considered liberally, sufficient cause has to be made out before condoning the delay. The conduct of the party praying for condonation of delay is also a relevant factor. In support of this submission, he relied upon the judgment of the Apex Court in the case of **Balwant Singh Vs. Jagdish Singh**, AIR 2010 SC 3043. He also relied upon the judgment of the Apex Court in the case of **Sunil Poddar Vs. Union Bank of India**, AIR 2008 SC 1006 to contend that the petitioner has suppressed material facts. He submitted that though the petitioner was keeping track of the matter, she chose not to participate in the proceedings.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, respondent has filed two proceedings namely, one for restitution of conjugal rights and other for custody of minor child. By order dated 18.08.2015, both the Petitions are decreed. A perusal of that order shows that in paragraph 11, the learned Judge noted that parties were referred to Marriage Counsellor. Several rounds of mediation and attempts of settlement followed. The counsellor, mediator and the Court tried their level best to help the parties to come to an amicable settlement. But all the efforts were in vain.

8. The petitioner has filed application dated 11.01.2016 for condonation of delay of 145 days in filing the application under Order IX, Rule 13 of C.P.C. for setting aside ex-parte decree. In paragraph 28, it is contended that earlier, she had filed Miscellaneous Application bearing (St.) No.1133 of 2015 on 23.12.2015 for setting aside ex-parte decree dated 18.08.2015. If that date is considered as the date of the knowledge then in that event, there is no delay in filing the application

under Order IX, Rule 13 of C.P.C. for setting aside ex-parte decree. The office objection was raised for filing separate application for condonation of delay and therefore, she is filing separate application for condonation of delay. In paragraph 11, she also made reference to settlement talks are going on between the parties out of the Court. As mentioned earlier, the delay is of 145 days. In the case of ***State of Nagaland Vs. Lipok A.O.***, AIR 2005 SC 2191, it is held by the Apex Court that what counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. The expression “sufficient cause” should be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay.

9. Mr. Shah relied upon the decision in **Balwant Singh** (*supra*). In that case, there was delay of 778 days in filing the application in question, which is not the case here. In so far as the decision in **Sunil Poddar** (*supra*) is concerned, it deals with suppression of material facts. Mr. Shah contended that in the present case though petitioner was keeping track of the proceedings, she did not deliberately participate. Mr. Shah has relied upon application dated 29.12.2014 made by the petitioner for certified copies. However, no material is produced showing that the petitioner had knowledge of passing of ex-parte decree on 18.08.2015. That apart, she had earlier filed Miscellaneous Application (St.) No.1133 of 2015 under Order IX, Rule 13 of C.P.C. on 23.12.2015. Because of the office objection, she filed separate application i.e. present application for the condonation of delay. In view thereof, I do not find any merit in the submission of Mr. Shah. I also do not find that the decisions relied by Mr. Shah are applicable in the facts of the present case. In the light of the judgment of the Apex Court in **State of Nagaland** (*supra*), I find that the learned Judge has committed

a serious error in dismissing the application. Not only that, the learned Judge also imposed costs of Rs.3,000/-. Hence, imugned order dated 24.05.2018 is liable to be set aside and is accordingly set aside. The delay of 145 days in filing application under Order IX, Rule 13 of C.P.C. stands condoned. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

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