



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 17.09.2019
DELIEVRED ON : 01.11.2019

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CORAM:

THE HONOURABLE MRS.JUSTICE J. NISHA BANU

C.R.P(MD)Nos.1112 and 1162 of 2019
and
CMP(MD).No.6069 of 2019 in C.R.P.(MD).No.1112 of 2019

Jayesh Kumar Prahaladhan Thirumal

... Petitioner in both the Petitions /
Petitioner

Vs.

Abiramavalli

... Respondent in both the petitions /
Respondent

COMMON PRAYER: Civil Revision Petitions are filed under Section 115 of C.P.C., against the orders dated 02.05.2019 passed in I.A.No.527 of 2016 in H.M.O.P.No.202 of 2012 and I.A.No.465 of 2018 in H.M.O.P.No.744 of 2014 by the Family Court, Madurai.

For petitioner in
both the petitions : Ms.Selvi George
For respondent in
both the petitions : Ms.S.Vengalakshmi

COMMON ORDER

C.R.P.(MD).No.1112 of 2019 has been filed by the petitioner against the order dated 02.05.2019 passed in I.A.No.527 of 2016 in H.M.O.P.No.202 of 2011, whereby and whereunder the Court below has dismissed the petition filed by the petitioner seeking to condone the delay of 1189 days in filing a petition to set aside the ex parte order dated 30.07.2013.

2.C.R.P.(MD).No.1162 of 2019 has been filed by the petitioner against the order dated 02.05.2019 passed in I.A.No.465 of 2018 in H.M.O.P.No.744 of 2014, whereby and whereunder the Court below has dismissed the petition filed by the petitioner seeking to condone the delay of 569 days in filing a petition for restoration of H.M.O.P.No.744 of 2014, which was dismissed for default on 28.02.2017.

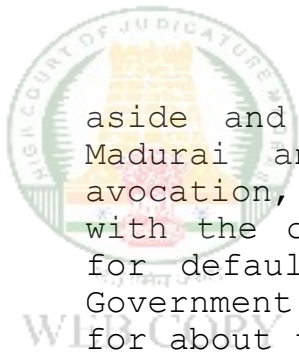


3. Since the issue involved in both the petitions interrelated to each other and the parties are one and the same, both the petitions were heard together and are being disposed of by way of this common order.

4. The marriage between the petitioner and the respondent was solemnized on 06.06.2008 and after marriage, they went to USA and lived there for about two years and then, they returned to India during December, 2010 and thereafter, they lived separately due to misunderstanding. The petitioner alone went to USA to continue his job. On 22.12.2011, the respondent has filed H.M.O.P.No.202 of 2012 for restitution of conjugal rights. Due to non appearance of the petitioner, he was set *ex parte* on 27.06.2013 and thereafter, H.M.O.P. was allowed in *ex parte* on 30.07.2013 by the Court below. For filing a petition to set aside the *ex parte* order dated 30.07.2013, there occurred a delay of 1189 days. For condoning the said delay, the petitioner has filed I.A.No.527 of 2016 in H.M.O.P.No.202 of 2012. The Court below has dismissed the said petition holding that the petitioner has not assigned sufficient reason for condoning the enormous days of delay. Challenging the said order, the petitioner filed C.R.P.(MD).No.1112 of 2019 before this Court.

5. In the meantime, the petitioner filed H.M.O.P.No.861 of 2013 for divorce before the Family Court, Chennai, through a power agent and it was, later on, transferred to the file of the Family Court, Madurai, based on the order passed in the transfer petition, which was filed by the respondent and renumbered as H.M.O.P.No.744 of 2014. Due to non appearance of the petitioner, it was dismissed for default on 28.02.2017. For filing a petition to restore the said H.M.O.P., there occurred a delay of 569 days. In order to condone the delay of 569 days, the petitioner has filed I.A.No.465 of 2018. The Court below has dismissed the same holding that the petitioner has not assigned sufficient reason for condoning the enormous days of delay. Challenging the said order, the petitioner has filed C.R.P.(MD).No.1162 of 2019.

6. The learned counsel for the petitioner submitted that the petitioner did not receive any notice in the petition for restitution of conjugal rights and therefore, he did not aware of the said proceedings and he could not appear before the Court below. He would further submit that as he was in USA for his avocation, he could not file the petition for setting aside the *ex parte* in time and therefore, the delay of 1189 days had occurred. He would further submit that the petitioner has filed the petition for divorce on the file of the Family Court, Chennai, through a power agent, in which the respondent failed to appear before the Court below even after receipt of notice and therefore, the Court below allowed the said petition in *ex parte* and subsequently, on an application filed by the respondent, the said *ex parte* order was set

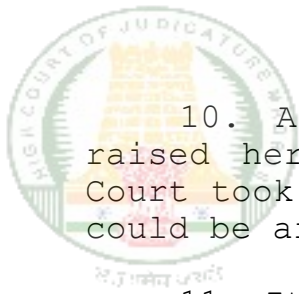


aside and it was transferred to the file of the Family Court, Madurai and due to unavoidable circumstances and due to his avocation, the petitioner went to USA and as he could not proceed with the case, the Court below dismissed the petition for divorce for default on 28.02.2017. Due to his avocation and change of Government and Policy in US, the petitioner could not come to India for about two years and therefore, the delay had occurred. The delay was not willful nor wanton and it was only due to his livelihood.

7. The learned counsel for the petitioner would further submit that in the meantime, the respondent has filed a maintenance petition in M.C.No.191 of 2015 and the petitioner entered appearance and conducted the case for some time and due to his avocation, he returned to USA and therefore, the Court below has allowed the maintenance petition in *ex parte* and for setting aside the said *ex parte* order, as directed by the Court below, the petitioner has deposited Rs.5 lakhs as interim maintenance. As the reasons for all the above three applications are one and the same, the Court below ought to have allowed the present delay applications filed in both the HMOPs also and ought to have given a chance for this petitioner to conduct his case on merits as now he is ready to cooperate with the Court below. Thus, he prayed to allow both the revision petitions.

8. The learned counsel for the respondent submitted that it is false to say that the petitioner has not been served with notice in the petition for restitution of conjugal rights and that the private notice sent to the petitioner was returned with an endorsement "refused" and she has sent notice and other papers related to the said petition to his email and after receipt of the same, the petitioner has sent his reply email also. On 21.05.2013, paper publication was also made. The petitioner has purposefully evaded to appear before the Court and therefore, the petition for restitution of conjugal rights was allowed in *ex parte*. She would further submit that when the petition for divorce listed for examination, the petitioner has purposefully not appeared before the Court below and delayed the matter, and therefore, the Court below has dismissed the said petition for default. The petitioner has not assigned valid reason for condoning each and every day of delay. The non appearance of the petitioner in the above cases is willful and wanton and therefore, the delay may not be condoned. She would further submit that though the petitioner has to pay arrears of Rs.42,40,000/- as maintenance as on 31.07.2019, the petitioner has deposited only Rs.5 lakhs as interim maintenance as directed by the Court below, for which leniency may not be shown to him. Thus, she prayed to dismiss both the revision petitions.

9. Heard both sides and perused the records carefully.



10. As it is a matrimonial dispute and the respondent/wife raised her willingness to live with the petitioner/husband, this Court took strenuous efforts to settle the matter, but no settlement could be arrived.

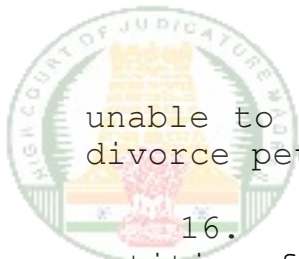
11. It is well settled law that the application for condonation of delay must be considered liberally and length of delay is not criteria. The Court has to see whether the parties have given acceptable and valid reason and the intention of the parties seeking such relief is *bona fide* and not *mala fide*. The claim of the parties should not be shut down at the threshold itself and they must be given an opportunity to put forth their case on merits.

12. The reasons stated by the learned counsel for the petitioner/husband for condoning the delay of 1189 days in filing a petition for setting aside the *ex parte* order is that (a) the petitioner has not received notice in the petition for restitution of conjugal rights and (b) he came to know about the *ex parte* order passed in the petition for restitution of conjugal rights only after his return to India.

13. Admittedly, no where, it is mentioned as to the service of Court notice in the petition for restitution of conjugal rights. However, it is seen that the private notice sent to the petitioner has been returned with an endorsement "refused" and paper publication has been made and he has also received notices through email. It would show that the petitioner was aware of the proceedings in the petition for restitution of conjugal rights. However, based on non service Court notice, the petitioner claimed that he has not been served with notice.

14. It is stated by the respondent that during the counselling held on 12.02.2015 and 17.02.2015 in H.M.O.P.No.744 of 2014, the petitioner was brought to the notice about the *ex parte* order passed in the petition for restitution of conjugal rights. But, the petitioner has filed the petition in I.A.No.527 of 2016 for setting aside the *ex parte* order before the Court below only on 02.11.2016. According to the petitioner, due to his avocation, he was unable to visit India and file the petition forthwith. It is not in dispute that the petitioner had been working in USA and he had to continue his avocation in USA, though he frequently visited India. Even for payment of maintenance amount, the petitioner/husband has to continue his avocation. Therefore, the reason stated by the petitioner is acceptable to some extent.

15. The main reason stated by the learned counsel for the petitioner/husband for condoning the delay of 569 days in filing a petition for restoration is that due to his avocation, he returned to USA and due to change of Government and policy in US, he was



unable to come to India and to file petition for restoration of the divorce petition and therefore, the delay of 569 days had occurred.

16. It is seen that the maintenance case as well as the petition for divorce were taken up together by the Court below and the petitioner has also filed proof affidavit and cooperated for trial till 2016. According to the petitioner, in order to save his job, he went to US during the 2nd week of December 2016. It is common knowledge, as rightly stated by the petitioner, there was work visa restriction, after formation of new Government in US. In support of the contention that the petitioner has not visited for two years after December, 2016, the petitioner has also produced his passport copy before this Court. The Court cannot wait till the presence of the petitioner from USA and therefore, the *ex parte* order was passed in the petition for restitution of conjugal rights and maintenance petition, and the petition for divorce filed by him was dismissed for default. At the same time, the Court cannot say that the petitioner ought to have attended the Court, after leaving his job in US. This Court is of the view that the reason stated by the petitioner is acceptable on practical and liberal approach. At the same time, due to the delay caused by the petitioner, the valuable time of the respondent wasted and therefore, she must be sufficiently compensated.

17. The Hon'ble Supreme Court in the decision in **Pavayammal and another Vs. S.N.Chockalingam and others** reported in **AIR 1987 SC 1353** has held as follows:

"The word 'sufficient cause' under Section 5 of the Limitation Act will have to be interpreted in a purposeful and meaning way. As a matter of fact, the Court of law is not supposed to adopt a pedantic approach instead it has to take a liberal view while dealing with the application of condonation of delay. Ordinarily a party does not stand to gain by lodging in appeal belatedly. Refusing to condone a delay will result in meritorious matter being thrown out at the nascent stage and thereby the cause of justice being defeated. On the other hand, if a party is allowed to enter into the scene of main proceedings then the matter can be decided on merits. Of course, a Court of law providing due opportunities to the parties to prove their case. The judicial is respected not on account of its power to legalise injustice on technical grounds but it is capable of removing injustice and is expected to do so. This Court is of the considered view that substantial justice will have to be delivered to the parties overriding technicalities and Court should adopt



liberal approach while condoning the delay in Section 5 petition."

18. In matrimonial dispute, the peace of mind can be reached by the parties, when they get substantial justice. It appears that the respondent is under the impression that she could live with the petitioner based on the *ex parte* order passed in the petition for restitution of conjugal rights. The fact remains that the Court cannot compel the parties to live together or to live separately. However, the broken heart can be united at any time, for which there would not be any bar under law.

19. Now, the petitioner submitted that he is ready to cooperate with the Court below for the disposal of both the HMOPs and also MC case. More over, it is not in dispute that the *ex parte* order passed in the maintenance petition filed on the same ground was allowed by the Court below on deposit of Rs.5 lakhs as interim maintenance and the same was complied with by the petitioner. In view of the above, this Court is of the view that the petitioner can be given an opportunity to defend his case by condoning the delay. Though the petitioner has assigned reason to some extent in the petition for condonation of delay of 1189 days, as the issue involved in both the HMOPs are interrelated to each other, this Court is of the view that it would be appropriate to allow the said petition also for substantial justice.

20. In view of the above, this Court is inclined to interfere with the orders passed by the Court below and to allow the petitions filed by the petitioner before the Court below.

21. In the result, both the civil revision petitions are allowed and the order dated 02.05.2019, passed by the Court below in I.A.No.527 of 2016 in H.M.O.P.No.202 of 2011 and in I.A.No.465 of 2018 in H.M.O.P.No.744 of 2014 are set aside and the delay are condoned subject to the payment of cost of Rs.2,00,000/- (Rupees two lakhs only) to the respondent within a period of two weeks from the date of receipt of a copy of this order. In the event of refusal of the respondent, the petitioner can file a memo before the Court below along with Demand Draft for Rs.2,00,000/- payable to the respondent. On such payment or filing a memo, the Court below shall number the petitions for setting aside the *exparte* order and for restoration and allow the same and then, to conduct joint trial in H.M.O.P. (MD).Nos.202 of 2011 and 744 of 2014 and also in M.C.No.191 of 2015 on day-to-day basis and complete the same within a period of



three months thereafter. Both the parties are directed to cooperate with the Court below. No costs. Consequently, connected miscellaneous petitions are closed.

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Sd/-

Assistant Registrar (CS-III)

Sub Assistant Registrar (CS)

To

1. The Family Court, Madurai.
2. The Record Keeper,
V.R. Section, (2 copies)
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.S.VENGALAKSHMI, Advocate (SR-95369[F] dated 01/11/2019)

+2 CC to M/s.SELVI GEORGE, Advocate SR-95596, 95595

common order made in
C.R.P. (MD) .Nos.1112 and 1162 of 2019
01.11.2019

GCG

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