

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO**

**C.R.P. No.5207 of 2018**

**O R D E R:**

This Revision is filed challenging the order dt.30.04.2018 in I.A.No.336 of 2017 in F.C.O.P.No.629 of 2013 of the Judge, Family Court, R.R.District.

2. Petitioner had filed the said OP seeking divorce from the respondent under the Hindu Marriage Act, 1955 (for short 'the Act').

3. Since the petitioner was not present and the respondent had filed a counter; the Court dismissed the O.P. on 05.01.2017 for default.

4. On 24.04.2017, petitioner filed I.A.No.336 of 2017 under Section 5 of the Limitation Act, 1963 to condone the delay of 78 days in filing the application to set aside the order dated 05.01.2017 and another application to set aside the said order.

5. In the affidavit filed in support of I.A.No.336 of 2017, he stated that his mother was old and suffered from ill health and she was admitted in the hospital and so he had to attend her on 05.01.2017 and could not attend the Court. He also stated that he was unable to inform his counsel on that day and so the delay be condoned and O.P. be restored to the file of the Court.

5. Counter affidavit is filed by the respondents opposing this application alleging that the mother of petitioner is hale and healthy and did not suffer with any ailments and was not hospitalized. It was also stated that petitioner has a brother who is also married and they could have taken care of the petitioner's mother. It is also alleged that petitioner did not submit the record of treatment of his mother and so the said delay cannot be condoned.

6. By order dated 30.04.2018, the Court below dismissed I.A.No.336 of 2017 and refused to condone the delay of 78 days in filing the application and set aside the order dated 05.01.2017.

7. It held that petitioner did not attend O.P. for any adjournment after filing it, that petitioner did not pay arrears of maintenance granted to the respondent in M.C.No.186 of 2009 under Section 125 Cr.P.C; that he appeared on 06.06.2017, and thereafter remained absent. It observed that the petitioner intentionally avoided the Court so that he need not pay maintenance awarded in M.C.No.186 of 2009 filed by the respondent. It referred to medical record filed by the petitioner relating to her hospitalization between 09.04.2017 to 16.04.2017 filed along with the written arguments of the petitioner, and stated that it is the record pertaining to a period long after O.P. was dismissed.

8. Assailing the same, this Revision is filed.

9. Petitioner's counsel contended that the Court below erred in dismissing I.A.No.336 of 2017 for condoning the short delay of 78 days in seeking to set aside the order dt.05.01.2017 dismissing the O.P. for default, and when valid cause was shown for the absence of the petitioner, the said delay ought to have been condoned.

10. Counsel for the respondents refuted the said contentions and supported the order passed by the Court below.

11. It is stated across the bar by the counsel for the petitioner that the mother of the petitioner had died on 27.04.2017.

12. It is no doubt true that the petitioner was not present on 05.01.2017, when the O.P. was listed before the Court below. The medical record filed by the petitioner indicates that the mother of the petitioner had been ill and was taking treatment from Sai Sanjeevani Hospitals prior to her death. It may be that the medical record available with the petitioner is only of the later period from 09.04.2017 onwards, but the fact that the mother of the petitioner was ill cannot be disputed. When there is no inordinate delay on the part of the petitioner and when he is performing his duty as a son and providing medical treatment and taking care of his mother, the Court

below ought to have adopted liberal approach and condoned the delay of 78 days in filing the application to set aside the order dt.05.01.2017 dismissing the O.P. for default, instead of rejecting the I.A.No.336 of 2017. There is no deliberate negligence on the part of the petitioner and his conduct cannot be said to be malafide.

13. Therefore, the order dt.30.04.2018 in I.A.No.336 of 2017 in F.C.O.P.629 of 2013 of the Judge, Family Court, L.B.Nagar, R.R.District is set aside; the said I.A. is allowed; and the Court below is directed to restore the O.P. to its file and then proceed to decide it, in accordance with law as expeditiously as possible, preferably, within one year from the date of receipt of copy of this order.

14. Civil Revision Petition is accordingly allowed. No order as to costs.

15. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

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**M.S.RAMACHANDRA RAO, J**

24.04.2019

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