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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 20th February, 2019*

+ **MAT.APP.(F.C.) 201/2018**

R R D

..... Appellant

Through: Mr.Mitthan Lal, Advocate

versus

R S

..... Respondent

Through: Ms.Perna, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S.SISTANI, J. (ORAL)

C.M. No. 33050/2018 (delay of 72 days in re-filing)

1. This is an application filed by the applicant/appellant seeking condonation of 72 days delay in re-filing.
2. Heard.
3. For the reasons stated in the application, the delay of 72 days in re-filing is condoned. The application stands disposed of.

C.M. No. 33048/2018 (delay of 55 days in filing)

4. This an application filed by the appellant/wife seeking condonation of 55 days delay in filing the present appeal. In view of the judgment rendered by the Full bench of High Court of Bombay in the case of *Shivram Dodanna Shetty vs. Sou. Sharmila Shivram Shetty* reported at *2016 SCC OnLine Bom 9844*, passed on 01.12.2016, the period of

limitation prescribed under sub-section (4) of Section 28 of Hindu Marriage Act, 1955 (hereinafter referred to as 'HMA') for an appeal under sub-section (1) of Section 19 of the Family Courts Act, 1984 is 90 days.

5. For the reasons stated in the application and the judgment rendered by the High Court of Bombay, delay of 55 days in filing the appeal is condoned.
6. The application stands disposed of.

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7. The present appeal is directed against the order dated 31.01.2018 passed by the Family Court on an application filed by the appellant/wife under Order IX Rule 13 of the Code of Civil Procedure (in short 'CPC') for setting aside the ex-parte judgment and decree dated 03.05.2008.
8. The necessary facts to be noticed for the disposal of the present appeal are that the marriage between the appellant/wife and the respondent/husband was solemnized on 22.05.1989 as per Hindu rites and ceremonies at Uttar Pradesh. One daughter was born out of their wedlock in the year 1991. As per the respondent/husband, they are living separately since 2004. The petition seeking divorce was filed by the respondent/husband under Section 13 (1)(ia) and (ib) of the HMA on 01.06.2007. A notice was issued to the appellant/wife. Despite service, the appellant/wife decided not to appear in the matter. The appellant/wife was proceeded ex-parte on 25.03.2008. Thereafter, on 03.05.2008, an ex-parte decree of divorce was passed under Section 13 (1) (ia) and (ib) of HMA by the Family Court.

9. Mr. Mitthan Lal, learned counsel appearing on behalf of the appellant/wife submits that the Family Court has erred in dismissing the application moved by the appellant/wife under Order IX Rule 13 on the ground that the delay of more than 4 year and 5 months has been satisfactorily explained, however, the same has been overlooked by the Family Court.
10. It is contended by the counsel for the appellant/wife that the Family Court has ignored the mandate of Order V of CPC as per which the Court must endeavour for service of summons by all modes including publication and affixation before proceeding ex-parte against the defendant. The counsel further contended that the respondent/husband has played a fraud upon the Family Court by producing a false report. The service report shows that the appellant was not found available at the given address as the same was found locked. Thus, it was contended that the order passed by the Family Court is bad in law and liable to be set aside.
11. The appeal is opposed by Ms. Prerna, counsel for the respondent/husband while submitting that ample opportunities have been granted to the appellant/wife and it is only after she chose not to appear in the Court, the Family Court proceeded ex-parte against her. It is thus prayed that there is no infirmity in the view taken by the Family Court.
12. We have heard learned counsel for the parties and considered their rival submissions. The application filed by the appellant/wife under Order IX Rule 13 of the CPC was dismissed on the ground that it was not accompanied by an application seeking condonation of delay of 5

years and 4 months in filing the application. The Family Court in para 7 has noted as under:

“7. It is perused from the main file that the non-applicant-husband has taken repeated steps for effecting service upon the applicant-wife through ordinary process as well as through registered AD which received back unserved on one or other reason and as per report the respondent-wife refused to accept the notice in the main petition. She was proceeded exparte vide order dated 25.03.2008 in the main petition finally culminating into passing ex-parte judgment impugned herein.”

(Emphasis Supplied)

13. To deal with the submissions made by the counsel for the appellant/wife, it would be necessary to peruse the application dated 17.03.2013 filed by her under Order IX Rule 13 of CPC for setting aside the ex parte judgment and decree dated 03.05.2008. The only reason for the delay in filing the application under Order IX Rule 13 of CPC has been enumerated in para 16 and 17 which read as under:

“16. That the petitioner could not apply for setting aside ex parte order earlier because this case file was handed over to a counsel namely Shri Ashok Aggarwal, who did not do the needful rather kept the Petitioner into dark and under the false assurances that he has already do the needful but when the matter was going in the cross examination in the court of Shri Ritesh Singh, ADJ, Delhi, in respect of the suit filed by the Petitioner, it finally came in the knowledge of Respondent that the previous counsel has not acted upon to do needful in the matter by moving appropriate application. Immediately taking the file back from Mr. Ashok Aggarwal, on 10.09.2013, has got prepared the present application and moved before the court without any further delay.

17. That there is no any delay on the part of the Respondent for moving the appropriate application, though, there are various judgments cited by the Respondent are in support of the case of Respondent. Otherwise also, the delay took place because of the

negligent act of the previous counsel who did not do the needful in the matter within the relevant time. After getting the file back on 10.09.2013, the Respondent without causing any delay has moved the present application, even without waiting for the certified copies.”

14. Reading of the foregoing application would show that the appellant claims that she came to know about the proceedings when the case was listed for cross-examination in the Court of learned ADJ. The earlier counsel engaged by her kept her in dark and did not pursue her case diligently. Thereafter, on 10.09.2013, she took file from her previous counsel and engaged a new counsel. There is no other ground raised by her while explaining the delay of more than 4 year and 5 months in approaching the Court. We may further note that no application was filed by the appellant/wife seeking condonation of delay.
15. In the case of ***Bhanu Kumar Jain vs. Archana Kumar*** reported at ***(2005) 1 SCC 787***, it was held by the Hon’ble Supreme Court that in an application under Order IX Rule 13 of CPC, the defendant may (a) question the correctness of the order posting the case for ex parte hearing and (b) contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date. However, (a) and (b) cannot be raised in a first appeal against the ex parte decree. The relevant para 25 reads as under:

“25. In an application under Order 9 Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.”

(Emphasis Supplied)

16. In view of *Bhanu Kumar Jain (supra)*, we find that apart from questioning the correctness or otherwise of an order posting the case for ex parte hearing, the defendant has to show sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date. Reading of the application under Order IX Rule 13 of CPC alongwith the impugned order would show that the appellant/wife has failed to give any satisfactory explanation for delay in filing the application under Order IX Rule 13 of CPC nor there was any application seeking condonation of delay of more than 4 year and 5 months. Thus, the Family Court has correctly dismissed the application under Order IX Rule 13 of the CPC.
17. We find that there is no infirmity in the view taken by the Family Court. The appeal is devoid of merit. Accordingly, the same is dismissed.

G.S.SISTANI, J.

JYOTI SINGH, J.

FEBRUARY 20, 2019

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