

HIGH COURT OF CHHATTISGARH, BILASPUR**MA No. 63 of 2018****Reserved on 16.02.2021****Pronounced on 23.02.2021**

- Shilendra Prasad Dubey, S/o Gajendra Prasad Dubey, aged about 34 years, Permanent R/o Village Bijapur, District Bijapur (C.G.) Present P.S.: Arjuni, District Dhamtari ---- **Appellant/Applicant**

Versus

- Smt. Priya Dubey alias Sneha, W/o Shailendra Prasad Dubey, Aged about 28 years, Father – Shri Ajay Shukla, R/o Budhiyari Bazar, Dongargarh, District Rajnandgaon (C.G.) ---- **Respondent/Non-Applicant**

For Appellant	: Smt. Renu Kochar, Advocate.
For Respondent	: Shri Keshav Dewangan, Advocate.

Hon'ble Shri Justice Sanjay S. Agrawal**C.A.V. Judgment / Order**

1. This Miscellaneous Appeal has been preferred by the Applicant-husband under Order 43 Rule 1 (c) of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') questioning the legality and propriety of the order dated 09.04.2018 passed in MJC No.13/2017, whereby the learned Court below has refused to restore the petition filed under Section 13 of the Hindu Marriage Act, 1955 (henceforth, the Act of 1955).

2. Learned counsel appearing for the Appellant submits that the Court below has committed an illegality in holding that the Appellant has failed to establish the sufficient cause for his non-appearance on 23.02.2017 and erred further in rejecting the application filed under Order 9 Rule 9 of CPC by holding it to be barred by time. It is contended that since the Appellant was assured by his counsel that his presence would be needed only when the written statement will be filed by the Respondent-wife and when the matter will be fixed for the

evidence. It is contended further that since he was not informed as such by his counsel, therefore, the reasons assigned in the application for restoration of the claim ought not to have been disbelieved by the Court below. It is contended further that since the application for restoration of the claim was made from the date of knowledge of its dismissal, therefore, it ought not to have been rejected on the point of limitation. In support, she placed her reliance on a decision rendered in the matter of ***Raj Kishore Pandey vs. State of Uttar Pradesh and others*** and ***Bhagwan Swaroop and others vs. Mool Chand and others*** reported in **(2009) 2 SCC 692** and **(1983) 2 SCC 132** respectively.

3. On the other hand, learned counsel appearing for the Respondent, while placing his reliance upon a decision rendered in the matter of ***Ragho Singh vs. Mohan Singh and others*** reported in **(2001) 9 SCC 717**, has submitted that since the application for condonation of delay in filing the said restoration application was not accompanied, therefore, the Court below has not committed any illegality in rejecting the same.

4. I have heard learned counsel appearing for the parties and perused the entire record carefully.

5. From perusal of the record, it appears that a claim for dissolution of marriage, solemnised on 10.05.2014, was filed by the Appellant-husband on the ground of cruelty provided under clause (ia) of sub-section (1) of Section 13 of the Act of 1955 on 05.10.2015, which was registered as Civil Suit No.34-A/2015. It was contested by the Respondent-wife and while allowing her application moved under Section 24 of the Act of 1955 on 20.12.2016, the Court below has fixed the case for the Appellant's evidence on 07.01.2017. On 07.01.2017, the Appellant was absent and the matter was, therefore, adjourned for 23.02.2017 at the request of his counsel. However, neither the Appellant nor his counsel

had appeared when it was called twice on the said date and, the matter was, therefore, dismissed for non-prosecution on 23.02.2017.

6. It appears that an application for its restoration was moved on 11.09.2017 by the Appellant under Order 9 Rule 9 of CPC, much beyond the prescribed period of 30 days by submitting, inter alia, that since he was assured by his counsel that his attendance would be required only when the case will be listed for evidence and since it was not informed, therefore, he could not appear on the said date. Further contention of him is that after the sufficient time has elapsed and when he did not receive the satisfactory response from his counsel, he came to Dantewada in order to ascertain the whereabouts of his case and then only he came to know regarding the dismissal of his claim through local counsel. It is stated further in the said application that upon knowing the same, he applied for its restoration from the date of knowledge. However, from perusal of the contents made therein, it has not been disclosed by the Appellant as to when did he come to know about the dismissal of his claim and that apart, no application for condonation of delay in filing the restoration application was made by him.

7. The trial Court, after considering the reasons assigned in the application, has refused to restore the same by observing, inter alia, that neither the reason assigned for his non-appearance was sufficient nor would it be appropriate to condone the delay in absence of an application for condonation of delay in filing the same and, I do not find any infirmity in the same as the application for restoration was made much beyond the prescribed period of 30 days without moving an application for condonation of its delay. Pertinently to be observed here further at this juncture that despite the objection being raised by the Respondent in her reply to the said application for restoration that it has not

been accompanied with an application seeking for its condonation, no effort was made by the Appellant for filing an appropriate application in this regard in order to cure the said defect. In view of that, it was not entertainable in the light of principles laid down by the Supreme Court in the matter of **Ragho Singh vs. Mohan Singh and others** (supra) wherein, when an application for condonation of delay of 10 days in filing the restoration application was not filed, it was observed at paragraph 6 as under:-

“6. We have heard learned counsel for the parties. Since it is not disputed that the appeal filed before the Additional Collector was beyond time by 10 days and an application under Section 5 of the Limitation Act was not filed for condonation of delay, there was no jurisdiction in the Additional Collector to allow that appeal. The appeal was liable to be dismissed on the ground of limitation. The Board of Revenue before which the question of limitation was agitated was of the view that though an application for condonation of delay was not filed, the delay shall be deemed to have been condoned. This is patently erroneous. In this situation, the High Court was right in setting aside the judgment of the Additional Collector as also of the Board of Revenue. We find no infirmity in the impugned judgment. The appeal is dismissed. No costs.”

8. In view of the aforesaid background, the principles laid down in the matters of **Raj Kishore Pandey vs. State of Uttar Pradesh and others** and **Bhagwan Swaroop and others vs. Mool Chand and others** (supra), as relied upon by learned counsel for the Appellant would, however, be of no use being entirely distinguishable from the facts involved herein.

9. Consequently, the appeal, being devoid of merit, is dismissed. No order as to costs.

Sd/-

(Sanjay S. Agrawal)
Judge