

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

**CIVIL APPLICATION NO.09 OF 2023 IN
FIRST APPEAL (ST.) NO.20543 OF 2022**

(Shri Amit Vijayrao Gampawar Vs. Sau. Pallavi Amit Gampawar)

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri R.D. Wakode, Advocate for the appellant.
Shri Yash Kallerwar, Advocate h/f Shri M. Anilkumar, Advocate for the
respondent.

CORAM:- URMILA JOSHI-PHALKE, J.
DATED :- FEBRUARY 03, 2023.

Heard.

2. By preferring this application, the applicant is seeking condonation of delay which is caused in filing the first appeal against the judgment and order passed by the District Judge, Pusad in MJC No.42/2018 dated 09/03/2020.

3. As per the contention of the applicant, non-applicant had filed an application under Section 25 read with Sections 17 and 19 of the Guardian and Wards Act, 1890 for obtaining the custody of the female child. The applicant and the non-applicant married on 13/06/2014. Out of their wedlock female child was born on 06/07/2015. After marriage some differences arose between the husband and the wife and the non-applicant has left the house of the applicant and subsequently, the application for custody of the child was filed. Said application was rejected by the District Judge-1, Pusad.

Against the findings of the District Judge, non-applicant has also preferred an appeal bearing No.590/2022.

4. It is the contention of the applicant that the District Court has observed that considering the object and purpose of the act due regard has to be given to the right of the father as natural guardian and he has succeeded in establishing that he is eligible for the custody on all counts for the welfare and well-being of the child however, there is a statutory obligation as per Section 6 of the Hindu Minority and Guardianship Act, 1956 that the child below the age of five years shall ordinarily stay with the mother, and therefore, the custody of the mother was continued.

5. It is further the contention of the applicant that he immediately applied for the copies on 19/03/2020 but due to the Covid-19 pandemic situation he could not file the appeal.

6. He preferred second application bearing MJC No.26/2020 on 24/11/2020 for obtaining the custody as liberty was granted to him by the District Court. However, that application could not proceed as non-applicant has not allowed to proceed as her appeal was pending before this Court. Therefore, the applicant has withdrawn the second application bearing No.26/20222 by seeking permission from the District Court by keeping his right to file appeal and thereafter this appeal is filed.

7. It is further contended that in view of the decision of the Hon'ble Apex Court in MCA No.21/2022 in

MCA No.665/2021 in Suo Motu Writ Petition No.3/2020 limitation period was excluded considering the pandemic situation, and therefore, no delay is caused in preferring this appeal. However office has raised an objection he has filed delay application. The appeal is filed in time and if this Court considers, there is delay it is for reasonable and justifiable grounds, therefore, delay be condoned.

8. Said application is strongly opposed by the non-applicant on the ground that the appeal itself is not maintainable as the applicant was having an opportunity to raise the objection by filing cross-objection which he had not filed in the appeal which is filed by the non-applicant. It is further the contention of the non-applicant that the second application was intentionally filed before the District Court, Pusad, which was subsequently transferred to Chandrapur. Before transfer order the application was withdrawn. It is further contention of the non-applicant that the delay is not properly explained and is intentional one. There is no justifiable and reasonable grounds for condonation of delay. Hence, application be rejected.

9. Heard Shri Wakode, learned Counsel for the applicant and Shri Kullerward, learned Counsel for the non-applicant.

10. Shri Wakode, learned Counsel for the applicant invited my attention towards the order passed by the District Court while rejecting the custody. It is specifically observed by the District Court that in view of

the statutory obligation, the custody of child who is below five years was continued with the non-applicant. He submitted that as liberty was granted to him to file an application for custody after child attains the age of five years, therefore, he preferred second application bearing No.26/2022. He further invited my attention towards the decision of the Hon'ble Apex Court wherein during Covid-19 pandemic period the limitation period was excluded. He further submitted that the District Court has decided this custody application on 09/03/2020, he immediately applied for the copies on 19/03/2020. The copies were ready on 11/06/2020 and the copies were delivered on 11/06/2020. The sheet attached with the certified copy sufficiently shows that the copies were issued during the pandemic period. He further submitted that everybody is aware that during 25/03/2020 till approximately August, 2021 restrictions were imposed on the movements of the general public, therefore, appeal was not filed within time. He submitted that second ground raised by the applicant is that he had filed MCA No.26/2022 but same was withdrawn as it could not proceed because the appeal of the non-applicant was pending before this Court. Thus, there are just and reasonable causes for condonation of delay. The delay is not deliberate one and applicant to be permitted to litigate his cause on merits and prayed for delay condonation.

11. On the other hand, learned Counsel for the non-applicant vehemently submitted that delay is

intentional one. The justifiable and reasonable cause is not mentioned for condonation of delay. In support of his contention he placed reliance on ***Balwant Singh Vs. Jagdish Singh and ors. 2010 LawSuit(SC) 443*** wherein in paragraph No.8 the Hon'ble Apex Court held that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribed and the courts have no power to extend the period of limitation on equitable grounds. The discretion exercised by the High Court was, thus, neither proper nor judicious. The order condoning the delay cannot be sustained. He submitted that here also there was an opportunity with the applicant to file his cross-objection when the non-applicant has filed the appeal but he had not availed the said opportunity. Thus, the grounds mentioned in the application are not sufficient and application deserves to be rejected.

12. After giving due consideration to the submissions made by the parties, undisputedly the non-applicant had filed an application for obtaining the custody of female child which was decided in her favour in view of the statutory provision. It is also not disputed that the District Court had granted leave to the applicant to file an appropriate application after the child attains the age of five years. Thus, liberty is already granted to the applicant to file an application. It is also undisputed fact, that the application was decided by the District Judge on 09/03/2020 immediately on 19/03/2020, the applicant

applied for the certified copies. The certified copies are received on his behalf on 11/06/2020.

13. It is not disputed that from 25/03/2020 due to Covid-19 pandemic lockdown was declared and the restrictions were imposed on the movements of the public till August, 2021. On 24/11/2022, the applicant preferred an application for obtaining custody bearing No.26/2022 in view of the liberty granted to him by the District Court. Somehow, that application could not proceed, and therefore, he filed an application for withdrawal of the said application by mentioning that he is challenging the judgment of the District Court by filing appeal before this Court and by reserving his right to file the appeal, he be permitted to withdraw the appeal. Accordingly, District Court has granted permission to the applicant to withdraw the said appeal, and therefore, this appeal is filed along with condonation of delay.

14. In the background of above circumstances, it has to be seen whether there are sufficient cause for condonation of delay and the applicant has satisfied that due to the unavoidable circumstances he could not file the appeal within time. The words “sufficient cause” is explained by the Hon’ble Apex Court in the catena of decisions. In ***Katari Suryanarayana Vs. Koppiseti Subba Rao 2009 AIR (SC) 2907*** the Hon’ble Apex Court has an occasion to construe the ambit, scope and application of the expression ‘sufficient cause’. The Hon’ble Apex court has referred the judgment of ***Perumon Bhagvathy***

Devaswom Vs. Bhargavi Amma (2008) 8 SCC 321 wherein it is held that the words “sufficient cause for not making the application within the period of limitation” should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words ‘sufficient cause’ in section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the applicant”.

15. In the case of ***State of Bihar Vs. Kameshwar Prasad Singh (2000) 9 SCC 94*** the Hon’ble Apex Court had taken a view that a liberal approach for condoning delay in cases of the Government to do substantial justice. Thus, in catena of decisions, Hon’ble Apex Court has held that while considering the delay application by taking into consideration the facts of each case liberal approach is to be taken and pedantic approach is not appreciable.

16. In the light of the above settled principles it has to be seen whether there are justifiable and reasonable cause for condonation of delay. As it is already observed that initially the applicant has applied for the certified copies, the certified copies are received by him during the pandemic period. It is an admitted position that from March, 2020 till February, 2021 there were strict restrictions on the movement of the citizens, and therefore, considering the said restrictions Hon’ble Apex

Court in *Suo Motu* Writ Petition No.3/2020 had considered the said aspect and excluded the period of limitation. It is apparent that the lockdown period was over in August, 2021. It means that the restrictions were on the citizens till August, 2021. Thereafter it was possible for the applicant to file an appeal or to challenge the order by appropriate proceeding however, he had not filed the same. Subsequently, he had filed an application for obtaining the custody in view of the liberty granted to him. Thus, it may be the reason for the applicant for not filing the appeal is that the liberty was granted to him to file another application after the ward attains the age of five years. As soon as the child attains the five years of age he filed second application. But as second application could not proceed as the appeal of the non-applicant was pending before this Court, he thought it proper to challenge the order of the District Court by filing this appeal. Thus, the applicant has explained the circumstances why he had not filed the appeal within the limitation. Thus, the sufficient and reasonable cause is sufficiently explained by the applicant while filing the delay condonation application. In the background of the above circumstances and the principles laid down by the Hon'ble Apex Court that while considering the delay condonation application, liberal, pragmatic approach is appreciated and not the pedantic approach.

17. It is also well settled that the parties to be permitted to litigate their cause on merits. In view of that

the application deserves to be allowed. Hence I proceed to pass the following order :

- (i) Civil application is allowed.
- (ii) Delay of 200 days is condoned subject to costs of Rs.5000/-. The non-applicant is entitled to receive the costs.

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Appeal be registered after depositing the costs.

2. As record and proceeding is already received in another appeal, this appeal can be admitted and can be heard along with other appeal.

3. **ADMIT.**

4. The applicant shall file private paper book in First Appeal No.590/2022.

5. This appeal be tagged along with First Appeal No.590/2022

6. Stand over to four weeks.

(URMILA JOSHI-PHALKE, J.)

**Divya*