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C.M.A.No.213 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	25.04.2023
Pronounced on	16.06.2023

CORAM

**THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR
AND**

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

**C.M.A.No.213 of 2016
and C.R.P.No.2237 of 2015**

C.M.A.No.213 of 2016

S.Ramkumar

...Appellant

Vs.

M.Bhagavathi

...Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 19 of Family Courts Act, 1984, appeal against the fair and decreetal order dated 22.01.2015 made in I.A.No.993 of 2014 in O.A.No.3317 of 2008 and allow the same.

For Appellant : Mr.S.Thamizharasi

For Respondent : Mr.B.Kumarasamy

C.R.P.No.2237 of 2015



C.M.A.No.213 of 2016

S.Ramkumar

....Petitioner

Vs.

M.Bhagavathi

...Respondent

Prayer: This Civil Revision Petition is filed under Article 227 of the constitution of India, to set aside the fair and decreetal order dated 22.01.2015 made in I.A.No.992 of 2014 in O.A.No.3317 of 2008 on the file of the III Additional Family Court, Chennai and allow the same.

For petitioner : Ms.S.Thamizharasi

For Respondent : Mr.B.Kumarasamy

COMMON JUDGMENT

(Judgment of the Court was delivered by K.GOVINDARAJAN THILAKAVADI,J.)

Both these civil miscellaeneous appeal and civil revision petition arises out of the order dated 22.01.2015 passed by the learned IIIrd Additional Principle Judge, Family Court, Chennai in I.A.No.993 of 2014 in O.P.No.3317 of 2018 and also in I.A.N o.992 of 2014 in O.P.No.3317 of 2008.

2. For the sake of convenience parties are referred to as husband and wife as



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both are appellant and respondent in the respective appeal and revision petition.

C.M.A.No.213 of 2016 arise out of the fair and decreetal order passed in I.A.No.993 of 2014 in O.P.No.3317 of 2008. In I.A.No.992 of 2014 the husband/appellant herein filed an application under Section 5 of the Limitation Act, for condoning the delay of 560 days in filing the petition to restore the main O.P.No.3317 of 2008 which was dismissed for default on 16.10.2012. In I.A.No.993 of 2014 the husband/appellant herein filed an application under Order IX Rule 9 of CPC to restore the O.P.No.3317 of 2018 which was dismissed for default on 16.10.2012.

3.By the impugned order dated 22.01.2015, the Family Court, dismissed the above petition stating that each and every day delay was not properly explained to the satisfaction of the Court. Accordingly, I.A.No.993 of 2014 was also dismissed, since application filed under Section 5 of Limitation Act was dismissed. Aggrieved by this, the present appeal and revision petition are filed.



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4.The learned counsel appearing for the husband/appellant herein would contend that the trial Court without disposing the interim applications in I.A.No.711 of 2009 and I.A.No.1288 of 2011 filed by the wife for permanent custody of the child and for visitation right, dismissed the main petition in O.P.No.3317/2008 for default which was filed by the husband for divorce. According to him, the interim applications cannot be maintained after dismissing the main O.P for default. Hence, under such circumstances, the present appeal and revision petition are filed to set aside the order dated 22.01.2015 in I.A.No.992 of 2014 and I.A.No.993 of 2014 in O.P.No.3317 of 2008.

5.Heard on both sides and records perused.

6. Admittedly, the husband has filed O.P.No.3317 of 2008 for divorce under Section 13(1)i-(a) of the Hindu Marriages Act, 1955 against the wife on the file of Ist Additional Family Court. At that stage, the wife has filed I.A.No.711 of 2009 in O.P.No.3317 of 2008 for the relief of visiting right of her minor daughter. She had filed another petition in I.A.No.1288 of 2011 in O.P.No.3317 of 2008 for



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permanent custody of her minor daughter. While these applications were pending main O.P.No.3317 of 2008 was dismissed for default on 16.10.2012 thereafter, the husband has filed I.A.No.993 of 2014 for restoration of O.P.No.3317 of 2008 which was dismissed for default on 16.10.2012 under Order IX Rule 9 CPC, 1908 and along with condonation of delay petition under Section 5 of Limitation Act,1955. The above petitions were dismissed on 22.01.2015 against which the present C.M.A.No.213 of 2016 and C.R.P.No.2237 of 2015 were filed.

7.The only contention raised by the appellant/revision petitioner/husband in the appeal and in the revision petition is that when the interim applications filed by the wife for permanent custody of child and for visiting right, the Family Court erroneously dismissed the main O.P. According to the appellant/revision petitioner/husband, while the main O.P itself is is dismissed for default, the interim applications are not maintainable.

8.This Court perused the entire materials available on record. The appellant/revision petitioner/husband has not stated any valid and acceptable reason for condoning the delay to the satisfaction of this Court.

9.At this juncture, it is worthwhile to refer a decision of the Hon'ble Supreme



Court in ***N.Balakrishnan v. M.Krishnamurthy*** reported in **1988 (2) CTC 533:**

WEB COPY (SC) 1988(7) SCC 123, dealing with the condonation of delay, and the relevant portion of the said decision of the Apex Court is extracted hereunder:

"9.It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes, delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long ranger can be condoned as the explanation thereof is satisfactory..'"

In another decided case of the Hon'ble Superme Court in ***Perumon Bhgvatby Devaswom v. Bhargavi Amma***, reported in **2008 (8) SCC 321**, the Apex Court held that

"the decisive factor in condonation of delay is not the length of the delay, but sufficiency of a satisfactory explanation. The Supreme Court in this case, added that the words "sufficient cause for not making the Application within



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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 the 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 Appellant. The Supreme Court also held that the extent or degree of leniency to be shown by a Court depends on the nature of Application and facts and circumstances of the case."

10.In the present case, the appellant/revision petitioner/husband did not explain the delay to the utmost satisfaction of the Court. The length of delay is no matter, but acceptability of the explanation is the core point even for entertaining any appeal. There is a delay of 560 days in filing petition for restoring the main O.P which cannot be entertained in a casual manner without there being proper explanation to the satisfaction of the Court.

11.Moreover, the applications for permanent custody of the child and



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visiting right are not the subject matters in the main O.P which was filed by the husband for divorce. Adjudication can be made separately in the above main application. Hence, the above contention of the appellant/revision petitioner/husband cannot be entertained. Hence, there is no merit in the appeal.

12.Keeping in mind, the principles laid down by the Apex Court in the decision cases cited above, we are of the view that the present C.M.A.No.213 of 2016 and C.R.P.No.2237 of 2015 are liable to be dismissed and is accordingly dismissed. There shall be no order as to cost.

(D.K.K.,J.) (K.G.T.,J.)

16.06.2023

vsn

Internet:Yes/No

Index:Yes/No

To:-

The IIIrd Additional Principle Judge, Family Court, Chennai

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D.KRISHNAKUMAR, J.
and
K.GOVINDARAJAN THILAKAVADI, J.

vsn



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**Pre- delivery common Judgement made in
C.M.A.No.213 of 2016
and C.R.P.No.2237 of 2015**

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