

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:-

The Hon'ble Justice Harish Tandon

And

The Hon'ble Justice Madhuresh Prasad

**FMAT 344 of 2023
with
I.A. No. CAN 2 of 2023**

***Devasree Biswas nee Das*
Vs.
*Sri Soumya Kanti Biswas***

For the Appellant : Mr. Subhash Chandra Sarkar.

For the Respondent : Mr. Ankit Agarwal,
Ms. Alotriya Mukherjee.

Heard on : March 19, 2024

Judgment on : May 22, 2024

Madhuresh Prasad, J.:

1. The present miscellaneous appeal arises out of an order dated 23.03.2023 whereby and whereunder Miscellaneous case No. 23 of 2022 filed under Order 9 Rule 13 read with Section 151 of the C.P.C. has been dismissed as being out of time.

2. The brief prelude to the order is that Matrimonial Suit No. 72 of 2019 was filed for divorce under Section 28 of the Special Marriage Act by the present appellant's husband. The same was contested by filing a written objection. Several dates were fixed in the matter and issues were framed. The suit thereafter was posted for evidence on 10.03.2021. On account of non-attendance of the learned Counsel on behalf of the present appellant who was the respondent in the

Matrimonial Suit, the matter was fixed for *ex parte* hearing on 08.04.2022. It is this order which the petitioner sought the recall of by filing a belated application under Order 9 Rule 13 read with Section 151 C.P.C. The application was filed after a delay of 92 days. For meeting the delay and to make out a case of sufficient cause for condonation of delay, an application was filed under Section 5 of the Limitation Act seeking condonation. After considering the application for condonation of delay, the Trial Court has found that sufficient cause has not been made out for condoning the delay. The application under Section 5 of the Limitation Act, therefore, has been found to be deficient to explain the circumstances for condonation of delay with sufficient cause. Miscellaneous Case No. 23 of 2022 filed under Order 9 Rule 13 read with Section 151 C.P.C. has thus been dismissed as being time barred.

3. The learned Counsel for the appellant has strenuously urged that during pendency of the proceedings, Court functioning had considerably been disrupted on account of the limited functioning of Courts during the outbreak of COVID-19 pandemic and the restrictions arising therefrom. Thereafter the learned Advocate of the present appellant appearing in the Trial Court was suffering from some post operative syndrome and he could not appear on 15.02.2022 when the matter was fixed for hearing. The Advocate was thus oblivious of fixing of the next date on 08.04.2022. He thus, could not appear on 08.04.2022 and an *ex parte* decree was passed

against the petitioner granting a decree of divorce by dissolution of marriage.

4. The substance of the plea is that neither the petitioner nor her Advocate was aware about fixing of the suit for hearing on 15.02.2022 and 08.04.2022. The petitioner was pursuing the matter diligently as evident from the fact that she filed the written objection. But the intervening circumstances, noted above, led to passing of an *ex parte* decree.

5. It is further case of the appellant that the appellant came to know about said order on 07.08.2022 and asked her Advocate to obtain a certified copy of the judgment and decree dated 08.04.2022. Application for certified copy of the *ex parte* decree was made on 10.08.2022 and certified copy of the same was made over to the appellant on 16.08.2022. Just six days thereafter on 22.08.2022, the application was filed under Order 9 Rule 13 read with Section 151 C.P.C. for recall of the *ex parte* decree dated 08.04.2022. In the circumstances, it is submitted by the learned Counsel for the applicant that the suit has been decreed *ex parte* due to reasons beyond control of the appellant and it would be in the interest of justice to set aside the *ex parte* decree and allow her an opportunity to pursue the matter having diligently filed written objection in this suit.

6. Having considered the submission of the appellant, we must record the legal position in this regard that while considering an application for condonation of delay, the Court should not adopt a

pedantic view of the matter and each and every day's delays is not required to be explained, length of delay not being the determining factor. The Court is required to see whether sufficient cause has been made out on the basis of facts which make out a case of due diligence on the part of the litigant and where the delay has occurred due to reasons beyond the control of the litigant/ counsel. Needless to say that these facts have to be found to be not lacking in *bona fides* and thereby constituting sufficient cause for condonation of delay.

7. In the present case, it has been pointed out by the learned Counsel representing the respondent that the present appellant in fact had appointed three Counsels to pursue the litigation on her behalf. Apart from the instant proceedings, where she was arraigned as a respondent, she had also filed applications under Section 125 Cr.P.C. for maintenance, bearing Miscellaneous Case No. 189 of 2019 in which an interim order was passed in her favour fixing a quantum of maintenance. Another case bearing Miscellaneous Execution Case No. 15 of 2020 was also filed by her claiming arrears amount of maintenance. All the three cases were in the same Court compound at Chandernagar, Hooghly. The Advocate representing the present appellant was actively participating in the other cases in Miscellaneous Case No. 189 of 2019. The petitioner withdrew amount of interim maintenance on 03.02.2022, 10.02.2022, 10.03.2023, 22.06.2022 and 27.07.2022. It is further pointed out that the petitioner was present by filing Hazirah in Execution Case No. 15 of

2020 on 09.03.2022, 19.04.2022, 18.05.2022 and 04.07.2022. Referring to these dates in the other two proceedings, it is submitted that the plea that the appellant or her Advocate was not having knowledge of the two orders dated 15.02.2022 and 08.04.2022 lacks *bona fide* and is thus unacceptable. The plea of her Advocate suffering with any kind of post operative syndrome is also unacceptable for the fact that she was represented by three Advocates in the different proceedings and it is not her case that all the three Advocates were suffering with post operative syndrome.

8. On perusing the photocopy of the orders passed in Miscellaneous Case no. 189 of 2019 and Execution Case no. 15 of 2020, we find force in submission of the learned Counsel for the respondent. On all the above noted dates the petitioner has either filed a Hazirah or withdrew amount of maintenance in the other two proceedings in the same court complex. It is apparent that she was regularly visiting the Court complex and was constantly in touch with her Advocate/s. The plea, therefore, raised by the present appellant that she was not having knowledge of the two dates i.e. 15.02.2022 and 08.04.2022 appears to us to be seriously lacking in *bona fides* and highly improbable and unacceptable, let alone constitute sufficient cause for condoning the delay.

9. The period of limitation for filing a petition under Order 9 Rule 13 read with Section 151 C.P.C. is prescribed by the statute as 30 days. After lapse of such time, a valid right accrued in favour of the other party. Thus, it is only if the appellant is able to show sufficient

cause based on *bona fides* that such valid rights which has accrued in favour of one party to the litigation can, in the interest of justice be taken away.

10. In view of the facts of the present case noted above, we find that sufficient cause was not made out by the appellant. The smoke screen created by the petitioner referring to post operative syndrome of the Advocate also does not appear to be sustainable for the fact that she had three different Advocates representing her in the proceedings noted above, all of whom had not undergone any surgery. At best it is the case of the appellant that one of her Advocates had undergone surgery and was allegedly going through a post operative syndrome.

11. Be that as it may from the conduct of the appellant and the ways she was diligently pursuing the other two proceedings arising out of Miscellaneous Case No. 189 of 2019 and Execution Case No. 15 of 2020, we find the plea of lack of knowledge of the dates on 15.02.2022 and 08.04.2022 to be highly improbable, unbelievable and unacceptable to constitute sufficient cause for condonation of delay.

12. Before parting with the case, we must refer to a recent decision of the Apex Court in the case of ***Pathapati Subba Reddy (Died) By L.Rs. and Others Versus Special Deputy Collector (LA)*** reported in **2024 SCC online SC 513** wherein the Apex Court has enumerated the relevant consideration for condoning the delay in the following terms in paragraph 26 :-

“26. On a harmonious consideration of the provisions of the law, as aforesaid, and the law laid down by this Court, it is evident that:

(i) Law of limitation is based upon public policy that there should be an end to litigation by forfeiting the right to remedy rather than the right itself;

(ii) A right or the remedy that has not been exercised or availed of for a long time must come to an end or cease to exist after a fixed period of time;

(iii) The provisions of the Limitation Act have to be construed differently, such as Section 3 has to be construed in a strict sense whereas Section 5 has to be construed liberally;

(iv) In order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind but the same cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act;

(v) Courts are empowered to exercise discretion to condone the delay if sufficient cause had been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as, where there is inordinate delay, negligence and want of due diligence;

(vi) Merely some persons obtained relief in similar matter, it does not mean that others are also entitled to the same benefit if the court is not satisfied with the cause shown for the delay in filing the appeal;

(vii) Merits of the case are not required to be considered in condoning the delay; and

(viii) Delay condonation application has to be decided on the parameters laid down for condoning the delay and condoning the delay for the reason that the conditions have been imposed, tantamounts to disregarding the statutory provision.”

13. Having considered the law we conclude that Section 3 of the Limitation Act is to be construed strictly and a balance has to be struck between the mandatory nature of Section 3 of the Limitation Act and the scope of condonation of delay under Section 5 of the Limitation Act to advance substantial justice. In view of the confirmed legal position, emanating from the recent decision of the Apex Court and having regard to the facts and circumstances noted above we find that the pleas taken by the Appellant lack *bona fide*. The petitioner's conduct suffers for want of due diligence and does not constitute sufficient cause for condonation of delay. We find no

reason to interfere with the order under appeal dated 23.03.2023 passed by the Learned Additional District & Sessions Judge, Chandernagar.

14. The instant appeal having been considered on merits is thus dismissed without any order as to costs.

15. Pending applications are also consequently dismissed.

16. Interim orders, if any, shall stand vacated.

(Madhuresh Prasad, J.)

17. I agree.

(Harish Tandon, J.)