



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 118 OF 2023

Rahul Raman Gulale

Age : 43 yrs, occ : service

R/o Gopal Nagar, Dhule Road,
Nandurbar, Dist. Nandurbar

Applicant.

Versus

Varsha w/o Rahul Gulale

Age : 37 yrs, occ : service

R/o Plot No.11, Vijay Nagar,
S-1, Shahada, Taluka Shahada,
District Nandurbar

Respondent

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Mr. Ruchir S. Wani, Advocate for the applicant.

Mr. Sanket Kulkarni, Advocate holding for Mr. G.R. Ingole,
Advocate for the respondent.

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CORAM : SANDIPKUMAR C. MORE, J.

Dated : 5 APRIL 2024.

Order :

1. The applicant, who is the original respondent in Civil Misc. Application No. 22/2022, has challenged the order dated 28.04.2023 passed by the learned District Judge-1, Nandurbar (hereinafter referred to as the “learned first Appellate Court”) in the said application which is filed by the respondent for condonation of delay of 38 days in filing appeal against the judgment and order dated 30.03.2022 in the Marriage Petition No. 42/2017 filed by the present applicant for getting divorce.

2. The background facts are as under :

The applicant and respondent had got married on 25.03.2012 at Nandurbar. However, after marriage dispute arose between them which resulted into filing Marriage Petition No.42/2017 by the present applicant against the respondent for getting divorce under Section 13 (1) (i-a) of the Hindu Marriage Act, 1955 in the Court of Joint Civil Judge (Senior Division), Nandurbar i.e. the learned trial Court. Thereafter on 30.03.2022, the learned trial Court was pleased to pass judgment and order in the said Marriage Petition and thereby dissolved the marital tie between the applicant and respondent by granting decree of divorce. The period for filing appeal which is of 90 days, was over on 28.06.2022, and therefore, as no appeal was filed by the present respondent – wife till then, the applicant performed second marriage with one Jyotsna Babulal Wagh on 25.07.2022. Thereafter respondent filed the aforesaid Civil Misc. Application No. 22/2022 on 08.08.2022 for condoning the delay in filing appeal against the judgment and order dated 30.03.2022. The applicant opposed the said application on the ground that delay was intentional and the application was filed with malafide intention as the respondent got knowledge of his second marriage. The learned first Appellate Court, after

taking evidence in the said application, allowed the application and condoned the delay of 38 days in filing appeal. Hence, this Civil Revision Application.

3. Learned Counsel for the applicant submits that in normal circumstances the order of the learned first Appellate Court appears sound, but when the applicant has remarried after the appeal period is over in respect of the judgment and order dated 30.03.2022 in Marriage Petition No. 42/2017, the learned first Appellate Court should not have condoned the delay since the appeal of respondent had become infructuous since inception. According to him, the marital tie between the parties had already been broken due to the said decree and on the remarriage of applicant there was no purpose to be served by filing appeal by the respondent. He pointed out that the learned first Appellate Court has definitely missed this aspect about the appeal of the appellant being infructuous since beginning. He pointed out that even after citing the judgment of Delhi High Court directly on the said point, the learned first Appellate Court erroneously condoned the delay. Besides oral submissions, the learned Counsel for the applicant relied on the judgment of *Delhi High Court* in the case of *Seema Devi vs Shree Ranjit Kumar Bhagat* and the Hon'ble Apex Court in the case of *Krishnaveni Rai vs*

Panjak Rai and another reported in ***(2020) 11 Supreme Court Cases 253.***

4. On the contrary, learned Counsel for the respondent supported the impugned order and submitted that at the stage of condonation of delay this Court cannot go into the merits of the case, and therefore, it has to be left to the discretion of the appellate Court to decide as to what is the effect of the decree of divorce and performance of second marriage by the applicant.

5. Heard rival submissions. Also perused documents on record alongwith the impugned order.

6. Admittedly, there was dispute between the applicant and respondent after their marriage which resulted into filing of Marriage Petition No. 42/2017 by the applicant for seeking divorce. It is also not in dispute that the learned trial Court granted decree of divorce in favour of the applicant husband vide judgment and order dated 30.03.2022. Further, it is also not in dispute that the respondent wife could not file appeal against the said decree of divorce within the stipulated period of limitation i.e. of 90 days and thereafter filed appeal alongwith delay condonation application bearing Civil Misc. Application No. 22/2022 on 08.08.2022. Thus, the delay of 38 days is definitely there

which has been condoned by the learned first Appellate Court by observing that the respondent was unable to file appeal within limitation period due to her transfer in Dhadgaon Taluka in respect of her service in Forest Department. The learned first Appellate Court has also observed that the applicant-husband was also not able to prove that the respondent wife filed that delay condonation application intentionally, deliberately and only after having knowledge of his second marriage.

7. In normal course, the act of learned first Appellate Court of condoning the delay of only 38 days in filing appeal, appears justified. However, in the instant case, the applicant-husband has performed second marriage with one Jyotsna Babulal Wagh on 25.07.2022 i.e. after the appeal period of 90 days from the date of decree of divorce was over. Therefore, the learned Counsel for the applicant, by heavily relying on the judgments of Delhi High Court and Apex Court cited supra, submitted that when the appeal of the applicant was infructuous since inception, the learned first Appellate Court should not have condoned the delay.

8. Thus, the situation in the present matter is little bit different than the normal delay condonation application. The learned Counsel for the applicant heavily relied on the

judgment of Delhi High Court in the case of Seema Devi (supra), wherein Delhi High Court has made reference to various judgments of the Hon'ble Apex Court discussing the effect of remarriage of either of the parties on the aspect of challenging decree of divorce between them. Scope of Section 15 of Hindu Marriage Act, 1955 has also been discussed in the aforesaid judgment by referring the judgments of the Hon'ble Apex Court in earlier cases. I would like to reproduce Section 15 of Hindu Marriage Act, 1955 for quick reference, as under :

“When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again”.

Learned Counsel for the applicant has therefore submitted that once decree of divorce is passed in favour of the applicant by competent court and after its appeal period is over he remarries, then the second marriage performed by applicant cannot be said illegal even if the first wife files appeal alongwith delay condonation application against such decree of divorce.

9. Delhi High Court in the aforesaid judgment in para-29 has made following observation :

“29. In terms of Section 15 of the Act, either party to the marriage is well within his or her right to marry when the time for filing an appeal has expired without an appeal having been preferred, or an appeal has been presented but the same has been dismissed. The bar or impediment to contract a second marriage operates during the pendency of appeal only if an appeal is preferred within the period of limitation. In other words, the provision enables parties to marry again only after the decree of divorce has become final”.

Delhi High Court has also made reference to the observation of the Hon'ble Apex Court in the case of *Krishnaveni Rai vs Panjak Rai* (supra) wherein the following observations are made in respect of Section 15 of the Hindu Marriage Act :

“28. Section 15 clarifies that when a marriage has been dissolved by a decree of divorce, and there is no right of appeal against the decree, or if there is such a right of appeal, the time for appealing has expired without an appeal having been preferred, or an appeal has been presented but the same has been dismissed, it shall be lawful for either party to the marriage to marry again. Had it been the legislative intent that a marriage during the pendency of an appeal should be declared void, Section 11 would expressly have provided so.

29. As held by this Court in *Anurag Mittal v. Shaily Mishra Mittal* [Anurag Mittal v. Shaily Mishra Mittal, (2018) 9 SCC 691 : (2018) 4 SCC (Civ) 550] , the object of Section 15 is to provide protection to the person who had filed an appeal

against the decree of dissolution of marriage and to ensure that such appeal was not frustrated. The protection afforded by Section 15 is primarily to a person contesting the decree of divorce. As observed by Bobde, J. in his concurring judgment in *Anurag Mittal* [*Anurag Mittal v. Shaily Mishra Mittal*, (2018) 9 SCC 691 : (2018) 4 SCC (Civ) 550] : (SCC pp. 702-703, paras 31 & 33)

“I am in agreement with the view taken by Nageswara Rao, J. but it is necessary to state how the question before us has already been settled by the decision in *Lila Gupta v. Laxmi Narain* [*Lila Gupta v. Laxmi Narain*, (1978) 3 SCC 258] . Even when the words of the proviso were found to be prohibitory in clear negative terms — “it shall not be lawful”, etc., this Court held that the incapacity to marry imposed by the proviso did not lead to an inference of nullity, vide para 9 of *Lila Gupta* [*Lila Gupta v. Laxmi Narain*, (1978) 3 SCC 258] . It is all the more difficult to infer nullity when there is no prohibition; where there are no negative words but on the other hand positive words like “it shall be lawful”. Assuming that a marriage contracted before it became lawful to do so was unlawful and the words create a disability, it is not possible to infer a nullity or voidness vide paras 9 and 10 of *Lila Gupta* case [*Lila Gupta v. Laxmi Narain*, (1978) 3 SCC 258]

33. What is held in essence is that if a provision of law prescribes an incapacity to marry and yet the person marries while under that incapacity, the marriage would not be void in the absence of an express provision that declares nullity. Quae incapacity imposed by statute, there is no difference between an incapacity imposed by negative language such as “it shall not be lawful” or an incapacity imposed by positive language like “it shall be lawful (in certain conditions, in the absence of which it is impliedly unlawful)”. It would thus appear that the law is already settled by this Court that a marriage contracted during a prescribed period will not be void because it was contracted under an incapacity. Obviously, this

would have no bearing on the other conditions of a valid marriage. The decision in Lila Gupta case [Lila Gupta v. Laxmi Narain, (1978) 3 SCC 258] thus covers the present case on law.”

31. In any case, the bar of Section 15 is not at all attracted in the facts and circumstances of this case, where the appeal from the decree of divorce had been filed almost a year after expiry of the period of limitation for filing an appeal. Section 15 permits a marriage after dissolution of a marriage if there is no right of appeal against the decree, or even if there is such a right to appeal, the time of appealing has expired without an appeal having been presented, or the appeal has been presented but has been dismissed. In this case, no appeal had been presented within the period prescribed by limitation.

32. The bar, if any, under Section 15 of the Hindu Marriage Act applies only if there is an appeal filed within the period of limitation, and not afterwards upon condonation of delay in filing an appeal unless of course, the decree of divorce is stayed or there is an interim order of court, restraining the parties or any of them from remarrying during the pendency of the appeal.

33. As observed above, the appeal was infructuous for all practical purposes, from the inception, since the appellant's ex-husband had lawfully remarried after expiry of the period of limitation for filing an appeal, there being no appeal till then.”

10. It is significant to note that Delhi High Court was scrutinizing the order passed by learned Additional District Judge, Delhi who had dismissed the application filed by appellant-wife therein under Order IX Rule 13 of C.P.C. for setting aside *ex parte* judgment and decree of divorce. The

High Court of Delhi, by relying upon the judgment of Hon'ble Apex Court in the case of ***Krishnaveni Rai vs Panjak Rai*** (supra) and also other judgments of the Hon'ble Apex Court, has observed that it was lawful for the respondent-husband therein to solemnize another marriage especially when their first marriage was dissolved by decree of divorce and no appeal was filed within stipulated period of limitation by the appellant-wife. As such, Delhi High Court upheld the decision of Additional District Judge, Delhi whereby it was observed that the application under Order IX Rule 13 of C.P.C. filed by the appellant-wife a day after the second marriage of respondent-husband was infructuous for all practical purposes and from the very inception.

11. Learned Counsel for the respondent tried to argue that the decree passed in favour of the present applicant was in fact an *ex parte* decree and no opportunity was given to the respondent-wife of leading evidence. He pointed out that this is only the stage of delay condonation and this Court cannot go into the merits of case at this juncture and it should have been left to the discretion of the Appellate Court as to what is the effect of such *ex parte* decree of divorce and remarriage of applicant-husband. However, Delhi High Court in the case of Seema Devi (supra) has made the following observation :

“It is trite that the dissolution of marriage is complete once the decree is made. A decree of divorce breaks the marital tie and the parties forfeit the status of husband and wife in relation to each other. Each one becomes competent to contract another marriage as provided by section 15 of the Act. In law the effect of ex parte decree of divorce is not different from a contested one. Even Section 15 of the Act does not make any distinction between a contested decree and an ex parte decree. Therefore, in case of an ex parte decree of divorce also it shall be lawful for either party to the marriage to marry again if no appeal is filed against such decree within the period of limitation”.

From the aforesaid observation, it is made clear that a decree is decree, whether contested or *ex parte* and it has the same effect on the marital relations between the parties. One cannot make any distinction that the *ex parte* decree of divorce is of lessor importance than the contested decree. Therefore, unless it was stayed by the learned trial Court even after passing it, the second marriage of the applicant is definitely lawful in view of the observation of the Hon'ble Apex Court in the case of ***Krishnaveni Rai vs Panjak Rai*** (supra).

12. The learned Counsel for the respondent has also tried to argue that the Appellate Court shall decide the effect of divorce decree and remarriage of the applicant with another woman. However, when the applicant-husband has already remarried to another lady and that too after getting

decree of divorce by the competent court and after appeal period is over, no purpose will be served to challenge the aforesaid decree of divorce by way of filing appeal. According to the observation of the High Court of Delhi in the case of ***Seema Devi*** (supra), the delay condonation application alongwith the appeal was in fact infructuous for all the practical purposes since its inception. Therefore, the act of the learned first Appellate Court of condoning delay of 38 days in filing the appeal by present respondent giving rise to one another infructuous litigation, is definitely perverse and illegal. The learned first Appellate Court should have summarily rejected such delay application considering the peculiar circumstances of the present case. Considering all these aspects, the Civil Revision Application stands allowed and the impugned order passed below Exh.1 in Civil Misc. Application No. 20/2022 dated 26.04.2023 is quashed and set aside and the said Civil Misc. Application stands dismissed alongwith appeal itself. The Civil Revision Application is accordingly disposed of.

(SANDIPKUMAR C. MORE, J.)