



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.481 OF 2021
WITH
CIVIL APPLICATION NO.11989 OF 2021**

Sow. Sharda Sharad Sahane,
Age : 31 years, Occu.: Service,
R/o.: Taluka Agricultural Office,
Badnapur, in front of Tahsil Office,
Tq. Badnapur, District : Jalna

.... **APPELLANT**
(Orig. Defendant)

VERSUS

Sharad Uttamrao Sahane,
Age : 34 years, Occu.: Service,
R/o.: N-8, D2, Plot No.4,
Shree Ganesh Nagar Housing Society,
CIDCO, Aurangabad
Now R/o.: Taluka Agricultural Office,
Jafrabad, District : Jalna.

.... **RESPONDENT**
(Orig. Plaintiff)

.....
Mr. Mahesh L. Muthal, Advocate for the Appellant
Mr. Sanjay D. Hiwrekar, Advocate for the Respondent

....
CORAM : SANDIPKUMAR C. MORE, J.

RESERVE ON : 11/07/2024

PRONOUNCE ON : 20/07/2024.

JUDGMENT :

1. By consent of the learned counsel of the rival parties, heard finally at admission stage.

2. The present appellant / wife has preferred this second appeal against the judgment and order dated 15/09/2021 passed by the

learned District Judge-10, Aurangabad (hereinafter referred to as 'the learned first appellate court') in Civil Miscellaneous Application No.168 of 2020, whereby the application filed by the present appellant / wife for condonation of delay of 166 days in challenging the impugned order dated 29/08/2019 passed by the learned trial court i.e. 12th Joint Civil Judge (Senior Division), Aurangabad, whereby marriage between the present appellant and respondent solemnized on 02/04/2013 has been dissolved by way of decree of divorce.

3. Background facts are as under :

The marriage between the appellant / wife and respondent / husband had solemnized on 02/04/2013 and they are having one girl child out of the said wedlock. However, a dispute arose between them after few days of the marriage resulting into filing of Hindu Marriage Petition No.3 of 2016 by the respondent / husband on 16/12/2015 before the learned trial court for getting decree of divorce. Though the said petition was resisted by the appellant / wife under her written statement, but she did not lead any evidence. As such, vide decree dated 29/08/2019 the learned trial court dissolved marital tie between the appellant and respondent. The appellant thereafter filed Civil Miscellaneous Application No.

168 of 2020 for condonation of delay of 166 days in challenging the aforesaid decree of divorce alongwith appeal. However, on 15/09/2021 the learned first appellate court rejected the said application by refusing to condone the delay by observing the negligent approach of the appellant. Hence, this second appeal.

4. The learned counsel for the appellant / wife vehemently argued that the learned first appellate court has definitely erred in not condoning the delay of 166 days. According to him, the appellant / wife had succeeded in establishing that the delay was caused since her advocate did not inform her about the decree of divorce in time. According to him, the learned first appellate court should have dealt the delay condonation application liberally but by dismissing the same, it has violated the principle of natural justice since the decree of divorce was passed exparte.

5. On the contrary, the learned counsel for the respondent / husband supported the impugned judgment and order of the learned first appellate court as well as the decree of divorce passed by the learned trial court. His main contention is that after passing the decree of divorce dated 29/08/2019 the respondent / husband remarried to one Mayuri on 01/10/2019 and now he is

having one son from his second wife by name Purvesh, who has born on 18/06/2020. Thus, he submitted that even if the delay in filing first appeal by the appellant / wife is condoned, then also in view of second marriage of the respondent / husband, the present second appeal has become infructuous. For this purpose he relied on the judgment of this court in Civil Revision Application No. 118 of 2023 (Rahul Raman Gulale vs. Varsha Rahul Gulale) dated 5th April, 2024.

6. Admittedly, the appellant / wife and respondent / husband had got married on 02/04/2013 and out of the said wedlock they are having one daughter. However, because of the dispute arose between themselves, the respondent / husband had to file Hindu Marriage Petition No. 3 of 2016 before the learned trial court for decree of divorce, which he got on 28/08/2019. Though the learned counsel for the appellant / wife is contending that the learned first appellate court should have condoned the delay of 166 days in challenging the aforesaid decree of divorce, which was in fact passed ex-parte, but there is another angle to the present matter that after passing the aforesaid decree of divorce, the respondent / husband got married again with one Mayuri and out of his second marriage, they are having one son- Purvesh. It is

extremely important to note that the appellant / wife was well aware about the second marriage during pendency of her delay condonation application before the learned first appellate court. The order in the said application itself indicates that the appellant / wife herself had filed a pursis at Exhibit-9 alongwith the certificate of second marriage of the respondent / husband.

7. It is significant to note that the learned first appellate court has refused to condone the delay of 166 days by observing that the appellant / wife is a responsible government officer and therefore, she should have been more diligent in prosecuting the petition of divorce filed by the respondent / husband and therefore, the delay could not have been condoned on the basis of one line reason that her advocate did not inform her about the date of judgment in the divorce petition. In normal course it may appear that the learned first appellate court, instead of refusing to condone the delay, should have allowed the same. However, it is not a normal case of delay condonation by taking lenient view, but there is also another aspect in this matter i.e. the remarriage of the respondent / husband after passing the decree of divorce. The learned counsel for the respondent / husband has relied on the judgment of this court as mentioned above, wherein judgments of Delhi High Court

and Hon'ble Apex Court are considered, wherein an effect of remarriage of husband after getting a decree of divorce is discussed.

8. In the case of **Seema Devi vs. Shree Ranjit Kumar Bhagat, 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 challenging the decree of divorce between them by considering the scope of Section 15 of the Hindu Marriage Act 1955. For quick reference, the aforesaid Section 15 is reproduced below:

“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”.

The learned counsel for the respondent / husband by relying on the aforesaid section submitted that once such decree of divorce is passed in favour of the respondent / husband by the competent court, the second marriage performed by him in absence of any appeal against the said decree, cannot be said illegal even if the

first wife files an 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 extremely important to note that in the aforesaid judgment Delhi High Court was scrutinizing the order passed by the learned Additional District Judge, Delhi who had dismissed the application filed by the appellant / wife therein under Order IX

Rule 13 of C.P.C. for setting aside judgment and decree of divorce passed against her ex-parte. However, by relying upon the judgment of the Hon'ble Apex Court in the case of ***Krishnaveni Rai vs. Panjak Rai and another reported in (2020) 11 Supreme Court Cases 253*** and also other judgments of the Hon'ble Apex Court, the Delhi High Court observed that it was always lawful for the respondent / husband therein to solemnize another marriage specially when their first marriage was dissolved by decree of divorce and no appeal was filed by the wife within stipulated period of limitation. 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 after second marriage of respondent / husband was infructuous for all the practical purposes and from the very inception.

11. The learned counsel for the appellant / wife has submitted that the decree of divorce passed in favour of the present respondent / husband was in fact ex-parte decree. Despite filing written statement by the appellant / wife, she was denied with an opportunity of cross-examining the husband as well as leading her evidence. According to him, the stage before the learned first

appellate court was only of the delay condonation and it was not considering the effect of such ex-parte decree of divorce and remarriage of the husband. Admittedly, no cross-examination of respondent / husband was taken by the learned counsel for the appellant / wife before the learned trial court and she also did not lead any evidence. But for that purpose the observation of Delhi High Court in the case of **Seema Devi vs. Shree Ranjit Kumar Bhagat** is of utmost importance which reads thus :

“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”.

As per the aforesaid observation, there is no discrimination in contested decree or ex-parte decree and both are having same effect on the marital relations between the parties. One cannot say that the ex-parte decree of divorce is of lessor

importance than the contested one. As such, unless such ex-parte decree was stayed by the learned trial court even after passing it, the second marriage performed by the respondent / husband 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 appellant / wife also tried to submit that the learned first appellate court should have considered the effect of divorce on the decree and remarriage of the respondent / husband with another woman after condoning the delay. However, when it is admitted fact that respondent / husband had already remarried to second wife – Mayuri after getting decree of divorce from the competent court and at the time of said second marriage, no appeal by the present appellant / wife was preferred, then as per the observation of Delhi High Court in the case of **Seema Devi** (*supra*), the delay condonation application filed by the appellant / wife alongwith the appeal had already become infructuous for all the practical purposes since its inception. Therefore, even if the learned first appellate court had allowed the application of the appellant / wife for condonation of delay, but in that case it would have given rise to another futile exercise. Therefore, considering this aspect, the refusal of the

learned first appellate court in condoning the delay in filing appeal by the appellant / wife, definitely appears appropriate.

13. The only substantial question of law which this court has framed under order dated 4th April 2024, is as follows:

“Whether the present appeal has become infructuous on remarriage of husband”?

Therefore, in the light of discussion made above, the above substantial question has to be answered in the affirmative. Thus, the present second appeal stands dismissed and disposed of alongwith pending Civil Application No.11989 of 2021.

(SANDIPKUMAR C. MORE, J.)