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**(2009) 11 MAD CK 0132**

**Madras High Court (Madurai Bench)**

**Case No:** C.M.P. (MD) . No. 1 of 2007 in C.M.SA. Sr. (MD) No. 37739 of 2006

Vijayalakshmi

APPELLANT

Vs

Kannappan

RESPONDENT

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**Date of Decision:** Nov. 17, 2009

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 125
- Hindu Marriage Act, 1955 - Section 13(1)
- Limitation Act, 1963 - Section 5

**Citation:** (2012) 2 RCR(Civil) 368 : (2011) 2 RCR(Civil) 368

**Hon'ble Judges:** S. Palanivelu, J

**Bench:** Single Bench

**Advocate:** V. Venkatesha Perumal, for the Appellant; S. Ramesh @ Ramiah, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

@JUDGMENTTAG-ORDER

S. Palanivelu, J.

This petition has been filed to condone the delay of 550 days in filing the above C.M.S.A. against the decree and judgment passed in H.M.C.M.A. No. 35 of 2004, dated 31.07.2004, on the file of the District Court, Tirunelveli, confirming the judgment passed in H.M.O.P. No. 369 of 1993 on the file of the I Additional Subordinate Court, Tirunelveli, dated 19.12.2003.

2. The marriage of both parties was celebrated on 17.06.1984 in Paganeri. Due to love lost between them, they got separated which led the respondent to file a petition for divorce in H.M.O.P. No. 369 of 1993 u/s 13(1) of the Hindu Marriage Act. The petition was allowed dissolving the marriage by means of a decree, on 19.12.2003. The petitioner took the matter in appeal in H.M.C.M.A. No. 35 of 2004 on

the file of the First Additional District Judge, Tirunelveli and by means of a judgment, dated 31.07.2004, the appellate Court confirmed the order passed by the Court below dismissing the appeal.

3. From the above said appeal, the petitioner presently intends to prefer appeal before this Court, of course, with a delay of 550 days. In the affidavit, she has alleged that the copies of the judgment and decree were made ready on 29.12.2004. However, she was not in a position to file appeal within time, that after some period, she was advised to approach the Legal Aid for filing the appeal and in the mean time, there was a delay in filing the appeal and that if the delay is not condoned, she will be put to irreparable hardship and she has got a fair chance to have success in the appeal and hence, the delay may be condoned.

4. The respondent filed a counter affidavit by stating that the petitioner is a rich lady and she is possessing immovable properties and jewels that she has made false and frivolous complaints, that she wantonly did not file any appeal against the order of the appellate Court and allowed the appeal time to lapse and after that, she has belatedly filed this petition with a bald allegation that she was not in a position to file the delay, that the reasons mentioned in the affidavit do not constitute sufficient cause and she was actively involved in making complaints to All Women Police Station in Sivaganga and that since there was no hint of the petitioner filing any appeal against the dismissal of her first appeal in H.M.C.M.A. No. 35 of 2004, passed on 31.07.2004, he married one Shantha on 11.12.2005 at Mathur. Presently, the petitioner is living at Tirunelveli. The petitioner has got full knowledge of the marriage, that she has initiated u/s 125 of Cr.P.C. in M.C. No. 16 of 1996 before the Family Court, at Madurai, that she filed an application in Cr.M.P. No. 77 of 2002 for enhancement of maintenance from Rs. 500/- to Rs. 3,000/- per month, that if the delay is condoned, it will cause great hardships to the respondent herein, since initiation on the part of the petitioner is a very belated one.

5. The petitioner filed reply affidavits by stating that she was getting only a sum of Rs. 500/- per month as maintenance from the husband. Due to penury, she was unable to prefer appeal and after a good guidance, she approached the Legal Aid to prefer the appeal, which caused the delay of 550 days and that the delay may be condoned.

6. In the additional counter affidavit, the respondent has stated that the marriage which he contracted after the appeal time was over is lawful u/s 15 of the Hindu Marriage Act and as such, the petitioner's right have come to an end and she is not entitled to reopen the claim and that the petition u/s 15 of the Act is not maintainable.

7. The learned Counsel for the petitioner Mr. V. Venkatesh Perumal would submit that the averments contained in the affidavit and the additional affidavit filed by the petitioner are genuine, that she had no intention to delay the proceedings, that she

was getting only Rs. 500/- per month and hence, she could not prefer appeal from the appellate Court's order, that only after getting a proper legal advice, she approached the Legal Aid and presently, the petition has been filed and the bona fides of the petition could not be suspected, and that it is settled proposition of law in the matter of condonation of delay, the Courts have to take a liberal view.

8. In support of his contention, he placed much reliance upon a decision of the Supreme Court reported in 2002 (1) CTC 769 Ram Nath Sao @ Ram Nath Sahu and Ors. v. Gobardhan Sao and Ors. wherein Their Lordships have held that while considering the petition to condone the delay, the approach of the Courts should be liberal and the expression of "sufficient cause" in connection with the delay in filing application to set aside abatement and other similar provision should receive liberal construction so as to advance justice, when no negligence, inaction or want of bona fide is imputable to the party. It is also observed in the said decision that the Court should not proceed with tendency of finding fault and reject the petition in over jubilation of disposal drive that acceptance of explanation furnished should be rule and refusal is exception more so when no negligence, inaction or want of bona fide can be imputed to defaulting party. On the other hand, while considering the matter, the Courts should not lose sight of the fact that by not taking steps within the time prescribed, the valuable right accrued to the other party should not be lightly defeated by condoning the delay in a routine manner.

9. In the above said decision, the Supreme Court strike a note of caution in the matter of condonation of delay and even though it is held that liberal approach has to be taken while dealing with the condonation of delay, it should also be borne in mind that if any right has accrued to other party, it shall not be defeated by such condonation of delay.

10. Repelling the above said contention, the learned Counsel for the respondent Mr. M. Ramesh @ Ramiah would submit that the reasons adduced in the affidavit are not at all satisfactory, that they do not constitute sufficient cause for the consideration of the Court, that they are unbelievable, that by virtue of Section 15 of the Hindu Marriage Act, a valuable right has accrued to the respondent which could not be deprived of by condoning the delay, when no bona fides are shown before the Court.

11. The dates of disposal of the proceedings, the date of marriage, date of filing of Section 5 of the Limitation Act petition and the date of filing of Petition under Limitation Act are essential for the purpose of further proceeding with the matter. The Sub-court passed the order of decree for divorce on 19.12.2003. The appellate Court rendered the judgment on 31.07.2004. On 11.12.2005, the respondent contracted a second marriage and on 07.06.2006, the present petition u/s 5 of the Limitation Act has been presented into the Court along with the Civil Miscellaneous Appeal with a delay of 550 days in filing this appeal.

12. In order to ascertain the rights of the parties, it is profitable to extract Section 15 of the Hindu Marriage Act, 1955, which reads as follows:

15. Divorced persons when may marry again. - 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.

13. As per the provision, if a marriage was dissolved by a decree of divorce and when there is no right of appeal or if the time for preferring the appeal is over and if the appeal was dismissed, it shall be lawful for either party to marry again. In the case on hand, after disposal of the appeal on 31.07.2004, after about 16 months, the respondent married for the second time.

14. In this context, the learned Counsel for the respondent gained momentum and cited the authorities of the Supreme Court on this subject. The celebrated decision on this point is of the Full Bench of the Supreme Court in *Lila Gupta v. Laxmi Narain and Ors.* reported in 1978 (3) SCR 1922. The said decision has been followed by the Supreme Court in the subsequent decisions also. In this case, it is held that the net result is that since the amendment parties whose marriage is dissolved by a decree of divorce can contract marriage soon thereafter provided, ofcourse, the period of appeal has expired. This will reinforce the contention that such marriage is not void. The fact that neither spouse could remarry until the time for appeal had expired which in no way would affect the operation of the decree. It is a judgment in rem unless and until a court of appeal reversed it, the marriage for all purposes is put to an end.

15. In 1988 (2) SCC 90 *Tejinder Kaur v. Gurmit Singh* while the Supreme Court dealt with the impact of Section 15 of the Act, it is held that the holder of decree of dissolution of marriage passed by the High Court in appeal, entitled to remarry only after waiting 90 days from the date of the decree of the High Court as prescribed under Article 133(c) of the Limitation Act for filing of SLP and after ascertaining the fate of the appeal in case the appeal is filed. The operative portion of the decision in para: 4 goes thus:

It was observed that a decree for divorce breaks the marital tie and the parties forfeit the status of husband and wife in relation to each other. But there was nothing in Section 15 of the Act to make that marriage a nullity. The reason for this was an incapacity for second marriage for a certain period does not have the effect of treating the former marriage as subsisting.

16. In the said decision referred to above, the earlier decision of the Supreme Court reported in AIR 1967 Sc 581 *Smt. Chandra Mohini Srivastava v. Shri Avinash Prasad Srivastava and Anr.* has also been referred to, in which it is held thus:

7. In Chandra Mohini Srivastava v. Avinash Prasad Srivastava on somewhat similar facts it was held that though Section 15 in terms does not apply to a case of special leave to appeal to the Supreme Court, a spouse who has won in the High Court and got a decree of dissolution of marriage cannot by marrying immediately after the High Court's judgment take away the right of presenting an application for special leave to appeal from the other spouse. It was further held that the successful party must wait for a reasonable time and make sure whether an application for special leave has been filed in this Court.

17. A Division Bench of the Andhra Pradesh High Court in a decision reported in [Dr. Lokeshwari Vs. Dr. Srinivasa Rao](#), has held that the husband contracting the second marriage after expiry of the appeal period and filing of appeal beyond such period is not maintainable and that would be barred by limitation. The important portion of the judgment is as follows:

A party in whose favour a decree is granted must be planning to contract a second marriage. There is no illegality in such a desire. The reasonable time within which appeal is to be filed is provided in the provisions of the Act. The facts in this case disclose that the appellant has deliberately shown the address of the respondent to be at Kavali, though she is aware of the fact that the respondent is working in London. We are, therefore, of the view, such a party cannot be permitted to get away with such a design.

18. From the above said decisions, it emerges that a spouse who is successful of having a decree for divorce in his or her favour, has to wait for a statutory period as stipulated in Section 15 of the Hindu Marriage Act and if an appeal is filed beyond the period as contemplated in the provision, the second marriage contracted after such statutory period, cannot be held to be a void one. It is also settled proposition of law that the rights conferred upon a spouse by virtue of Section 15 of the Act cannot be defeated by condoning the delay, when no sufficient cause is shown for the said purpose.

19. Adverting to the facts of the present case, the reasons mentioned in the affidavit are that she was receiving only Rs. 500/- per month and due to her poverty, she approached the Legal Service Authority, at a later date, on a legal advice obtained by her which caused the delay.

20. In view of this Court, the delay remains unexplained. The earlier proceedings between the parties would go a long way to show that she was very well conversant with the Court proceedings and the inaction on her part in preferring appeal before this Court should be supported by convincing evidence and concrete materials, which are not present in the present case.

21. This Court is of the considered view that the reasons assigned in the affidavit are not explained to the satisfaction of the Court and the right lawfully accrued to the respondent cannot be taken away by condoning the delay for which sufficient cause

has not been shown. Hence, the petition suffers dismissal.

In fine, the petition stands dismissed. Consequently, connected M.P. is closed. No costs.