(2013) 04 BOM CK 0167

Bombay High Court (Aurangabad Bench)

Case No: Writ Petition No. 6228 of 2012

Shri Dnyandev		APPELLANT
	Vs	
Sunita		RESPONDENT

Date of Decision: April 2, 2013

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 125
- Limitation Act, 1963 - Section 5

Citation: (2013) 3 ABR 991 : (2013) 4 ALLMR 300 : (2013) 3 BomCR 33 : (2013) 2 BomCR(Cri) 499 : (2013) 4 MhLj 957 : (2013) 2 RCR(Civil) 682

Hon'ble Judges: S.S. Shinde, J

Bench: Single Bench

Advocate: S.S. Jadhavar, for the Appellant; A.K. Gawali, for the Respondent

Final Decision: Dismissed

Judgement

S.S. Shinde, J.

This writ petition takes exception to the order dated 26th June, 2012 passed by the District Judge-5, Ahmednagar in Civil Misc. Application No. 199 of 2009 thereby condoning delay of 1306 days caused in challenging the judgment and decree passed in HMP NO. 56/2001. The petitioner herein filed HMP No. 56/2001 seeking divorce from respondent. The said petition was allowed. The said judgment and decree was challenge by the respondent before the District Court, Ahmednagar wherein there was delay of 1306 days. The said delay was condoned. Hence, this petition.

2. The learned Counsel for the petitioner submits that after decree of divorce came to be passed and after expiry of limitation period as prescribed under the relevant provisions, the petitioner has performed second marriage and from the said wedlock, they are blessed with children. It is submitted that there was inordinate, unexplained and huge delay, which has been condoned by the district Court without sufficient cause disclosed by the respondent herein. It is submitted that the lower appellate Court has not

considered the evidence brought on record. It is submitted that the respondent only stated in here application for condonation of delay that the Advocate engaged by her did not inform her about the judgment and decree passed by the C.J.S.D., Ahmednagar on 13.12.2005. No material particulars have been averred in the application and no cogent evidence has been led in support of prayer of condonation of delay. The respondent wife was throughout aware about the proceedings before the trial Court as she participated in the same and led evidence. The respondent was aware about the grounds on which divorce decree was passed. The respondent did not lead any evidence in the said application by examining any witness. It is further submitted that the respondent did approach the J.M.F.C., Ahmednagar seeking maintenance u/s. 125 of Cr.P.C. The said application was dismissed and revision filed by the respondent before the Sessions Court challenging the order passed by the Magistrate being Criminal Revision Application No. 142 of 2010 was also dismissed by the said Court on 6th March, 2012. Therefore, relying upon the pleadings in the petition, annexures thereto and the judgment of the Supreme Court in case of P.K. Ramachandran Vs. State of Kerala and Another, , the learned Counsel for the petitioner submits that the petition may be allowed.

3. On the other hand, learned Counsel for the respondent submits that the petitioner was not made aware about the judgment and order passed by the C.J.S.D. and as a result, she could not file appeal within limitation. In the first round of litigation, the matter was remanded back to the trial Court and after remand, the trial Court did not issue notice to the respondent wife and as a result, the respondent could not prosecute the said proceedings effectively. It is submitted that while passing the judgment and order, the trial Court has observed that the respondent was living in adultery. It is submitted that the application filed by the wife for maintenance has been rejected on the ground that she was living in adultery. Therefore, according to the learned Counsel for the respondent, if the appeal is not heard on merits, it will cause great prejudice to the interest of the respondent. Therefore, relying upon the reasons recorded by the District Court, the learned Counsel for the respondent submits that petition is devoid of any merits and the same may be dismissed.

4. I have given careful consideration to the submissions of the learned Counsel for the parties, carefully perused the impugned judgment and order, contents of the application filed for condonation of delay by the respondent - wife and I am of the opinion that the view taken by the District Court, Ahmednagar needs no interference for the reasons stated herein below.

5. It is not in dispute that the matter was remanded back to the trial Court by the District Court in first round of litigation. HMP No. 56 of 2001 was initially decided on 26.2.2003 and the respondent herein did challenge the said order in RCA No. 116 of 2003. The appeal filed by the respondent - wife was allowed and the matter was remanded back to the trial Court. It is observed by the District Court in the impugned order that there is no evidence on record that notice after remand of the matter to the Court of C.J.S.D., Ahmednagar was received by the respondent to appear and lead evidence. Therefore,

the District Court observed that whatever the judgment and decree delivered in HMP No. 56 of 2001 is still ex parte and without merit for want of opportunity to the applicant - wife. It is also note worthy to observe that the application for maintenance filed by the respondent - wife before the J.M.F.C. came to be rejected on the ground that she lived in adultery. Therefore, if the respondent wife is not allowed to prosecute the appeal filed by her, the observations of the Court below that she lived in adultery would remain as a stigma and it will be difficult for the respondent - wife in future life to live with said allegation of adultery. Therefore, in my opinion, the District Court has rightly condoned the delay. Upon careful perusal of the averments in the application filed for condonation of delay, the main ground which is taken by the respondentï¿½wife is that her advocate did not inform her about the judgment and order passed by the trial Court thereby allowing the prayer of the petitioner - husband. There is a specific statement of the respondent wife in the application for condonation of delay that the Advocate who was engaged by her did not inform the respondent - wife about the judgment and decree passed by the C.J.S.D., Ahmednagar thereby allowing the prayer of the husband. This Court in case of Bhausaheb Mokale, Gautam Mokale and Anna Mokale Vs. Laxman Shankar Gaikwad, has taken a view that because of mistake of the Advocate, litigant should not suffer and, therefore, in appropriate cases, delay in filing the proceedings before the Higher Court challenging the judgment and order of the trial Court, deserves to be condoned.

6. In the case of Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, , in paragraph 3, the Apex Court observed:

3 The legislature has conferred the power to condone delay by enacting S. 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in mattes instituted in this Court. But the message doe sot appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

(1) Ordinarily a litigant does not stand to benefit by lodging an appeal late;

(2) Refusing to condone delay can result in meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned the highest that can happen is that cause would be decided on merits after hearing the parties.

(3) "Every day"s delay must be explained" does not mean that a pedantic approach should be made. Why not every hours delay, every seconds delay? The doctrine must be applied in a rational common sense pragmatic manner.

(4) When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non deliberate delay.

(5) There was no presumption that delay is occasioned deliberately, or on account culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay in fact he runs a serious risk.

(6) It must be grasp that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

7. Therefore, it follows from the authoritative pronouncement of the Supreme Court and also this Court that while considering the prayer for condonation of delay, various factors are required to be taken into consideration. In the case of Collector, Land Acquisition Anantnag (supra) the Supreme Court has laid down six principles. The first principle is that ordinarily a litigant does not stand to benefit by lodging an appeal late.

In the fact of this case, by lodging the appeal late, the respondent has not been benefited in any manner.

8. Therefore, in my opinion, if the respondent - wife is not heard on merits, it will cause irreparable loss to the respondent since there are observations of the competent Court that she lived in adultery. It is only by way of prosecuting the appeal filed before the District Court, she can get over such allegations. In my opinion, the case in hand sands on different footings on facts for the reason that if the appeal filed by the respondent is not decided on merits and if the decree is confirmed only because the husband has performed second marriage, it will affect not only status of the respondent - wife but, will also affect upon her prospectus since the competent court has made observations that she has lived in adultery. By way of the impugned order, the District Court has extended limitation for filing the appeal. Once such period of limitation is extended, appeal deserves to be heard on merits and the same cannot be thrown away after registration on the ground that there is delay in filing the appeal.

9. Therefore, in my opinion, in the facts and circumstances of this case, the view taken by the District Court is reasonable and possible view and needs no interference. The proceedings in hand stands on different footings since arising out of matrimonial proceedings and if the respondent - wife is not allowed to prosecute the appeal, it will cause irreparable loss and her future life will be ruined and the observations that she lived adulterous life will continue to remain without any opportunity to her for redressal of her grievance.

10. This Court in case of Jayashree Vilas Bhole vs. Dr. Vilas Pundlikrao Bhole [(2007 (1) BCJ 582] has taken a view that second marriage of husband cannot be accepted to be a ground to confirm the decree of dissolution of marriage. Therefore, for the reasons

aforesaid, in my opinion, no interference is called for in the impugned order. Hence, the writ petition is devoid of any merits and the same stands rejected.