2024 (I) ILR-CUT-804

ARINDAM SINHA, J & M.S.SAHOO, J.

MATA NO.114 OF 2019 (I.A. NO.26 OF 2023)

LABANYA PATI @ PATY …. Appellant

-V-

SANTANU KUMAR MISHRA ….Respondent

HINDU MARRIAGE ACT, 1955 – Section 25 r/w Section 19 of Family Courts Act and Section 5 of Limitation Act – There is delay of 1911 days – The applicant has preferred appeal confining her grievance to quantum of permanent alimony, considering subsequent fact of re-marriage of the respondent/husband– The respondent/husband is a doctor and the marriage was dissolved with a direction to pay permanent alimony of ₹3,00,000/- only – Whether it can be held lack of bonafide on the part of applicant? – Held, No – There are mitigating circumstances to hold that, the in-ordinate delay is required to be condoned.

Case Laws Relied on and Referred to :-

1. Civil Appeal Nos.8183-8184 of 2013 (13th September, 2013) : Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy & Ors.
2. AIR 1957 SC 540 : Garikapatti Veeraya v. N. Subbiah Choudhury

For Appellant : Mr. S. Dash

For Respondent : Mr. A. Kejriwal

JUDGMENT Date of Hearing & Judgment:02.02.2024

ARINDAM SINHA, J.

1. Mr. Dash, learned advocate appears on behalf of applicant/appellant-wife and submits, his client is aggrieved by judgment dated 25th March, 2014 made by the family Court dissolving the marriage and granting paltry sum of rupees three lakhs as permanent alimony. His client, in her financial circumstances, could not prefer the appeal in time. Reported delay of 1911 days be condoned and the appeal admitted.

2. Mr. Kejriwal, learned advocate appears on behalf of respondent-husband and opposes the application. He draws attention to his client's objection. In it stands disclosed, inter alia, deposition dated 20th December, 2014 in cross-examination of applicant-wife, recorded by the Assistant Sessions Judge. He points out from paragraph 34, applicant answered in cross-examination, it is a fact that after receipt of notice from the family Court for divorce at instance of her husband, on 22nd March, 2012 she had filed FIR. He then refers to annexure C1 in the objection, being applicant's application under order IX rule 13, Civil Procedure Code, 1908 to set aside ex parte impugned judgment. In paragraph 2 she had alleged not receiving any notice of the civil proceeding from the family Court. He submits, applicant is a person

who made false statement before the family Court in an application verified by her. In this context he relies on judgment dated **13th September, 2013** of the Supreme Court in **Civil Appeal nos.8183-8184 of 2013 (Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and others)**, paragraph 15 (Supreme Court Niti Print). He submits, by the paragraph the Supreme Court declared the principles, broadly culled out from several earlier authorities, regarding adjudication of an application for condonation of delay. He relies on clauses (v), (vi) and (viii), reproduced below.

> *"(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.*
>
> *(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.*
>
> *xx xx xx xx xx*
>
> *(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation."*

On query from Court Mr.Kejriwal submits, applicant did not prosecute her application for setting aside the ex parte judgment and hence, the application was dismissed. In the circumstances, in our view, so far as applicant having made false statement is concerned the statement was made in the application to set aside the ex parte judgment passed in the civil proceeding, it could have led to consequence of her being disbelieved.

3. Perused the application for condonation of delay. We have already noted that applicant had earlier filed for setting aside the judgment as ex parte. The application was dismissed on 27th November, 2017. We have ascertained that respondent-husband was noticed in the application but due to default of applicant, it was dismissed. Applicant has said that she came to know about the dismissal on 16th August, 2019. She then contacted with local lawyer for filing the matrimonial appeal and it was filed on 17th September, 2019.

4. The law provides dual remedy in case of ex parte judgment and decree, to the party against whom it was made. Said party can either apply for setting it aside under rule 13 of order IX in the Code or prefer appeal. In this case applicant had applied for setting aside the ex parte judgment. She was unsuccessful. On 27th November, 2017 the application stood dismissed. Because she had applied for setting aside of the ex parte judgment, it cannot be said that she therefore lost her right of appeal. Said right is a statutory right conferred by section 19 in Family Courts Act, 1984. In civil proceedings under the Code, appeal from orders and decrees have been provided for in orders XLI to XLIII. Mr. Dash points out, rule 21 in order XLI provides for application being made for rehearing an appeal decided ex parte. As such, the right of appeal stood vested in applicant the moment respondent-

husband had filed for divorce. For this proposition, reference may be made to judgment of the ***Supreme Court in Garikapatti Veeraya v. N. Subbiah Choudhury***, reported in AIR 1957 SC 540.

5. We have seen report of the stamp reporter. It was duly made in calculating the period commencing from date of impugned judgment and valid presentation, to report total period occupied as 2001 days less limitation of 90 days, to result in reported delay of 1911 days. The reporter cannot be faulted for not excluding time consumed during pendency of the application for setting aside the ex parte judgment. Since the law allowed applicant that remedy and she presented her application to the Court, who had passed impugned ex parte judgment, it is not a case where there could be exclusion under section 14 in Limitation Act, 1963. However, for the purpose of adjudicating the application made for condonation of delay under section 5, we must factor in the time consumed thereby.

6. Clauses (v), (vi) and (viii) under paragraph 15 in **Esha Bhattacharjee** (supra), the three relied upon principles, are lack of bona fides, adherence to strict proof should not affect public justice and cause public mischief and distinction between inordinate delay and delay of short duration.

7. To consider and ascertain effect of the principles on the facts in the case for condonation of delay we must keep in mind that the marriage was dissolved with direction to pay permanent alimony at ₹3,00,000/-, transmitted by demand draft to applicant, not encashed by her. On queries made we have also been told that respondent-husband is a doctor. On behalf of applicant submission is, she was and is unemployed. Nothing has been shown to us to be otherwise. In such fact situation, where applicant has preferred appeal confining her grievance to quantum of permanent alimony considering subsequent fact of respondent-husband having got remarried in the meantime, we cannot hold lack of bona fide on her part. This claim of applicant against respondent-husband is of an ex-wife for maintenance that the family Court directed under section 25 in Hindu Marriage Act, 1955. She is aggrieved. It is not a public matter and a judgment rendered by a Court regarding direction under section 25 must necessarily be confined to the facts and circumstances of the case, in which the judgment is given. Going by our discussion aforesaid regarding applicant having had earlier applied for setting aside the ex parte judgment, there are mitigating circumstances for us to hold that the inordinate delay is required to be condoned.

8. The delay is condoned and the appeal admitted. The application is disposed of.

—— o ——