

CASE NO.:
Appeal (civil) 5693 of 2006

PETITIONER:
Adhyaatamam \026 Bhamini

RESPONDENT:
Jagdish Ambalal Shah

DATE OF JUDGMENT: 11/12/2006

BENCH:
H.K. SEMA & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T

P.K. BALASUBRAMANYAN, J.

Leave granted.

Heard the appellant in person and learned counsel
for the respondent.

1. The appeal challenges the order of the High Court of Bombay in Review Petition No. 2 of 2005 in Civil Application (M) No. 1 of 2004 in Family Court Appeal ST No. 40517 of 2003. The appellant had filed a petition in the Family Court B-40 of 1992 seeking a declaration that she is a joint owner or a half owner of the properties scheduled to the petition. The appellant and the respondent were wife and husband. They married on 15.11.1959. They were living together. They begot two sons. The respondent filed a petition for divorce against the appellant on 26.2.1990. The grounds urged were cruelty and desertion attracting Sections 13(1)(ia) and 13(1)(ib) of the Hindu Marriage Act, 1955. The appellant in her turn filed the present proceeding seeking a declaration of her half right to the properties that stood in the name of her husband, her husband and others and for a perpetual injunction restraining the husband from alienating the properties.

2. The petition for divorce was allowed by the family court sometime in 1993 by granting a decree for divorce on the grounds put forward. The appellant challenged that decree unsuccessfully in the High Court. The appellant thereafter approached this Court by way of further appeal. This Court confirmed the decree for divorce but modified the quantum of alimony payable by the husband and raised it to Rs.5,000/- per month from Rs.1,000/- per month. That was on 5.2.1997. The marital relationship was thus finally put an end to by the decree.

3. The appellant pursued her proceeding for declaration and injunction relating to the properties. The family court, after trial, by judgment dated 24.1.2003, dismissed the claim. It held that the appellant had failed to prove that the properties standing in the name of the respondent and respondent and others, were joint acquisitions or that she had a half share therein. It may be noted that this Court had while confirming the decree for divorce, left open the claim of the appellant regarding the properties, to be pursued in the family court.

4. Feeling aggrieved by the dismissal of her claim in respect of the immoveable properties, the appellant filed an

appeal before the High Court of Bombay as Family Court Appeal ST No. 40517 of 2003. That appeal was a delayed one. The appellant therefore filed Civil Application (M) No. 1 of 2004 for condoning the delay of 81 days in filing the appeal. The court found on a calculation, which had not been indicated in the application by the appellant, that the delay was of 62 days. The respondent resisted the application pleading that no sufficient cause was made out for condoning the delay. The High Court after noticing that in such matters a liberal approach is generally adopted, held that in the case on hand, the appellant had not made out sufficient cause for condoning the delay. Before consequently disposing of the appeal as belated, the High Court also heard learned counsel on merits of the appeal in the light of the depositions of the witnesses and the other relevant material produced. The High Court found that there was no reason to differ from the conclusions of the family court regarding the title to the properties and that the finding that the appellant had no joint ownership in the properties was justified. Thus, the application for condoning the delay in filing the appeal and the appeal were dismissed by the High Court.

5. The appellant thereupon filed R.P. No. 2 of 2005 seeking a review of the order in the application for condoning the delay in filing the appeal. The Division Bench of the High Court found no ground to review the order earlier made. Thus, the review petition was dismissed. The appellant challenges the order on the review petition passed on 13.7.2005 in this appeal.

6. Of course, this Bench has recently held in *Kumaran Silks Trade (P) Ltd. (2) Vs. Devendra and ors.* [(2006) 8 SCC 555] that no Petition for Special Leave to Appeal under Article 136 of the Constitution of India can be maintained against an order refusing to review a judgment. But in this case, taking note of the circumstances as a whole including the extent of the delay in filing the appeal, we have thought it appropriate to consider whether the High Court was justified in refusing to condone the delay in filing the appeal in the first instance.

7. The High Court has noticed that though originally in the petition for condoning the delay, the cause therefor had been put at the door of the appellant, in the petition for review the delay is attributed to inaction on the part of the counsel who was appearing for the appellant at the earlier stage. What is seen is that the appellant received the certified copy of the judgment of the family court, according to her, after some effort. Thereafter, she left for the United States of America. After she came back, the appeal was filed. Her case is that she had entrusted the matter with her counsel for filing the appeal in time even before she left for the United States of America. On her return, she found that counsel had not filed the appeal. Thereafter, she ensured that the appeal was filed along with a petition for condoning the delay in filing the same, which of course, she had signed. Her present case is that due to the absence of care on the part of her counsel that appeal was not filed in time. But in the application filed earlier, the suggestion was that it was due to her illness and her having to go to the United States that the delay occurred. The High Court found that there was no sufficient cause made out for condoning the delay. When she came up with a different story and tried to put the blame on her counsel, the High Court held that there was no ground made out for review of its earlier order.

8. It is true that the appellant came forward with an inconsistent case when she sought the review of the earlier order. But the fact remains that even while confirming the decree for divorce, this Court had left open the claim of the appellant in respect of the properties to be adjudicated in the proceeding pending before the family court, namely, the present proceeding. The family court has, on appraisal of the materials before it, come to the conclusion that the appellant has not made out her claim in respect of the properties. The appeal sought to be filed by the appellant was no doubt delayed by 62 days. It is also true that the High Court while declining to condone the delay had also generally referred to the merits of her claim on the evidence adduced.

9. The delay as found by the High Court was only of 62 days. No doubt, under Section 19 of the Family Courts Act, 1984, the time for filing an appeal is only 30 days from the date of judgment or order of a family court. There is no exclusion of the application of Section 5 of the Limitation Act. Since the appeal is to the High Court, Section 5 of the Limitation Act gets attracted on its own terms. There was no objection that Section 5 of the Limitation Act was not applicable. In that situation, the only question was whether the appellant had made out sufficient cause for condoning the delay in filing the appeal. We do find some inconsistency in the case of the appellant as noticed by the High Court. We also find that the High Court had made a cursory examination of the merits of the claim of the appellant before dismissing the application for condonation of delay. But, in the circumstances, we feel that the appellant ought to be given an opportunity to argue her appeal on merits. This is without any reference to the merits or demerits of her appeal. But in view of the varying stands adopted by her, we feel that it would be appropriate to grant her that opportunity only by putting her on terms. Considering the prior relationships between the parties, we think that the costs to be paid by the appellant to the respondent in this Court need not be a very substantial sum, though obviously, it could not be an insignificant sum. In that view, we order that this appeal will stand allowed, the orders of the High Court will stand set aside and the delay in the appellant filing the appeal before the High Court will stand condoned on condition that the appellant deposits in the High Court of Bombay, a sum of Rs. 10,000/- towards costs thrown away within a period of six weeks from today. On the said sum of Rs. 10,000/- being deposited, it will be open to the respondent to immediately withdraw the same unconditionally. In the event of the deposit being made within time, the appeal would be heard afresh by the High Court on merits and disposed of in accordance with law. In case, the costs as indicated above are not deposited, the order of the High Court challenged herein will stand confirmed and this appeal will stand dismissed.