HIGH COURT OF JAMMU AND KASHMIR AND LADAKH
AT JAMMU

Reserved on   09.02.2022
Pronounced on 25.02.2022

CR No. 31/2008(O&M)

Meena Bhan   …..Appellant(s)/Petitioner(s)

Through: Mr. P. N. Goja, Sr. Advocate with
Mr. Sachin Razdan, Advocate

vs

Ravinder Garyali   .….. Respondent(s)

Through: Mr. L. K. Sharma, Sr. Advocate with
Mr. Meyank Gupta, Advocate

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1.   The present civil revision has been filed against the order dated 28.11.2007 passed by the learned Additional District Judge (Matrimonial Cases) Jammu (hereinafter to be referred as the trial court) passed in file No. 15/Misc by virtue of which the learned trial court has set aside the *ex parte* order dated 26.05.2004 by virtue of which the maintenance *pendente lite* as well as litigation expenses were granted to the petitioner. The order has been assailed primarily on the ground that the learned trial court had no power to condone the delay in setting aside *ex parte* order as section 5 of the Limitation Act is not applicable to the proceedings under Hindu Marriage Act. It is further stated that the appeal was required to be filed against the said order, as the order dated 26.05.2004 amounts to decree.

2.   Mr. P. N. Goja, learned senior counsel appearing for the petitioner has restricted his arguments only to the extent that the provisions of the limitation Act are not applicable to the proceedings under the Hindu Marriage Act and as such, the order impugned is not sustainable in the eyes of law. He further argued that the respondent had a remedy of assailing the order before the higher forum. Mr. Goja placed reliance upon the judgments reported in 1981KashLJ 427, 2008(4) Supreme 335 and also upon the judgment of Madras High Court in case titled "P T Lakshman Kumar versus Mrs Bhavani" decided on 23.04.2013.

3.   *Per contra*, Mr. L. K. Sharma, learned senior counsel appearing for the respondent has submitted that the provisions of Limitation Act are applicable when the applicant avails the remedy under the Code of Civil Procedure (for short the Code) and as such, there is no illegality in the order impugned.

4.   Heard and perused the record.

5.   The brief facts, which are necessary for the disposal of the present petition, are that the respondent had filed a petition for grant of divorce initially before the court of District Judge, Delhi and the same was transferred by the Apex Court to the trial court wherein the petitioner caused her appearance and filed an application for grant of interim maintenance under section 30 of the Hindu Marriage Act. The respondent had initially appeared and subsequently absented himself from the proceedings, as such the petition filed under section 13 of the Hindu Marriage Act was dismissed vide order dated 08.03.2004 and vide order

dated 26.05.2004, the respondent was directed to pay the maintenance *pendente lite* with effect from 28.04.2000 till the divorce petition was dismissed along with litigation expenses.

6.   When the petitioner sought the execution of the order, the respondent laid a motion for setting aside the *ex parte* order made under section 30 of the Hindu Marriage Act and also laid a motion seeking restoration of the main petition. As the petitioner has restricted his arguments only to the issue with regard to the application of the Limitation Act to the proceedings under the Hindu Marriage Act, as such, this Court does not deem it appropriate to narrate the facts in detail pleaded in the application for setting aside ex-parte order dated 26.05.2004 except to the extent that in the said application it was stated that because of the ailment of the counsel engaged by the respondent, the main petition was dismissed and application under section 30 of the Hindu Marriage Act was decided ex-parte. Further in para 19 of the application filed on 25.09.2004 for setting aside the ex-parte order, the respondent had pleaded that the application being against the interim order and not the final order, is covered by Article 181 of the Limitation Act and is within time. Even otherwise the delay, if any, is condonable. In response to this para, the petitioner in her objections has not specifically replied the said contention of the applicant. The perusal of the order impugned reveals that the issue of delay in laying a motion was not raised before the trial Court and perhaps because of this reason, the issue of delay has not been specifically dealt with but the order impugned reveals that the learned trial court has stated that the respondent

has made out a sufficient cause for his non appearance in the court and accordingly the application of the respondent for setting aside the *ex parte* order dated 26.05.2004 was allowed.

7.   The petitioner has not raised any objection with regard to the delay either in her pleadings before the trial court or during the course of the arguments before the learned trial court, as is evident from the order impugned.

8.   The contention of Mr. Goja is that the order passed under section 30 of Hindu Marriage Act amounts to decree and appeal was required to be filed and section 5 of the Limitation is not applicable to the proceedings under Hindu Marriage Act. If the contention of the Mr. Goja is taken to be correct that order under section 30 of Hindu marriage Act amounts to decree, then certainly when the said decree is passed ex-parte, the respondent can resort to the provisions contained in the Code of Civil procedure for setting aside the ex-parte decree/order. As per section 23 of Jammu and Kashmir Hindu Marriage Act, the provisions of the Code of Civil Procedure have been made applicable to the proceedings under the Hindu Marriage Act so far as the same are not inconsistent with the provisions of the Jammu and Kashmir Hindu Marriage Act. No doubt the respondent had a remedy of assailing the order before the High Court by laying an appropriate motion but nonetheless, the remedy for setting aside the *ex parte* order for grant of maintenance as available under the Code has not been barred by the Jammu and Kashmir Hindu Marriage Act and as such, the aggrieved party against whom ex-parte order for grant of maintenance has been made is well within his rights to resort to the

provisions contained in the Code for setting aside or recall of the *ex parte* order. Had it been the intention of legislature to exclude the provisions of section 151 or Order 9 Rule 13 CPC to the proceedings under Hindu Marriage Act, then the legislature would have done it expressly. Once the Code is applicable to proceedings under Hindu Marriage Act, then certainly the section 5 of limitation Act will apply when the aggrieved party resort to remedy under the Code. Section 5 of Limitation Act, would apply even in a case where the petition filed under J&K Hindu Marriage Act is dismissed for default and application seeking restoration of the petition is filed beyond time. In "Santosh Devi versus Omkar Lal" reported in 1981 KashLJ 427 it was held that the section 5 of Limitation Act has no application when the appeal is filed beyond the period of limitation prescribed by section 34(4) of J&K Hindu Marriage Act. The judgment is not applicable in the instant case as this court is not dealing with any appeal against the decree passed under J&K Hindu Marriage Act. Likewise, the judgment of Apex Court in 2008(4) Supreme 335 is not applicable in the instant case. Thus this Court is of the considered view that the provisions of the limitation Act are applicable to the proceedings under Hindu Marriage Act, when the party resort to the provisions contained in code of civil procedure either for setting aside/recall of ex-parte order or for restoration of the petition dismissed for default/non-prosecution and if the court is satisfied that the litigant was prevented by sufficient cause to approach the court within the stipulated time for availing the remedy, then the court can condone the delay.

9.   In view of what has been discussed above, the present petition is found to

be without merits and as such is dismissed.

                                                        (Rajnesh Oswal)
                                                              Judge

JAMMU
 25.02.2022
Rakesh

              Whether the order is speaking: Yes/No
              Whether the order is reportable: Yes/No