
(2013) 08 KL CK 0078
In the High Court Of Kerala
Case No : Criminal R.P. No. 116 of 2012

Abdul Salam

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 26-08-2013

Acts Referred:

Citation : (2014) 1 DMC 190 : (2013) 4 KHC 196 : (2013) 4 KLT 289

Hon'ble Judges : K. Harilal, J

Bench : Single Bench

Advocate : S. Shanavas Khan, for the Appellant; T. Madhu, B.K. Rajagopal and Seena Ramakrishnan, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

K. Harilal, J.—The Revision petitioner is the respondent in M.C. No. 60 of 2010 on the files of the Judicial First Class Magistrate's Court Haripad. The above case was filed by the 2nd respondent herein who claims to be the wife of the revision petitioner coming under S. 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short "the Act"). It is the case of the complainant that on 1.8.2008 at about 12 a.m., the revision petitioner committed trespass into the house of the 2nd respondent and attempted to rape her. The Police registered crime No. 198/2008. Thereafter, the revision petitioner and his relatives informed the 2nd respondent's mother and uncle that he is willing to marry her. On 3.8.2008, the marriage was solemnized as per muslim customary rites. But subsequently, on 22.8.2008, the marriage was dissolved by the pronouncement of "talak" by the revision petitioner. The 2nd respondent observed iddat for three months. She prayed for Rs. 6 lakhs as reasonable and fair provision and Rs. 15,000/- as maintenance for iddat period.

2. The revision petitioner herein could not enter appearance in the M.C. and he was set ex parte. On the side of 2nd respondent PWs. 1 and 2 were examined and Exts.P1 to P4 were marked. After appreciating the evidence, the revision petitioner was directed to pay an amount of Rs. 9,000/- towards maintenance for

iddat period and Rs. 3,60,000/-towards reasonable and fair provision.

3. When the revision petitioner came to know the ex parte order, he filed a petition to set aside the ex parte order passed against him. The petition to set aside the ex parte order was filed with a delay of 58 days. But, no separate petition had been filed to condone the delay. But, the learned Judicial First Class Magistrate, Haripad, dismissed the petition on the ground that the petition was barred by limitation and it was filed beyond a period of seven days as mandated by the Proviso to R.4 of the Muslim Women (Protection of Rights on Divorce) Rules, 1986 (for short "the Rules"). This order is under challenge in this Revision Petition.

4. Shri. S. Shanavas Khan, the learned counsel for the revision petitioner submits that though the proviso to R.4 of the Rules mandates that the petition to set aside the ex parte order shall be filed within seven days from, the date of order, the petition to condone delay of more than seven days can be entertained after seven days in view of the application of S. 29(2) of the Limitation Act. The point canvassed by the learned counsel for the revision petitioner is that unless the operation of Ss. 4 to 24 of the Limitation Act is excluded by specific provision in the special statute, automatically, the application of those Sections of the Limitation Act will come into play by virtue of S. 29(2) of the Limitation Act. In support of the above argument, the learned counsel placed reliance on the decision reported in K.K. Pushpakaran Vs. Union of India (UOI), In this decision, the Division Bench of this Court had confronted with a similar situation. But, the only difference is that the statute under consideration in that decision was Railway Claims Tribunal Act.

5. Shri. T. Madhu, the learned counsel for the 2nd respondent also fairly admits that unless the operation of Ss. 4 to 24 of the Limitation Act is specifically excluded in the special statute, by virtue of the operation of S. 29 of the Limitation Act, a petition to condone the delay can be accepted after a specific period provided under the special statute.

6. In view of the arguments advanced at the Bar, the question to be considered is whether an application to set aside an ex parte order passed under R.4 of the Rules can be entertained after the prescribed period of "seven days" from the date of ex parte order, with a petition to condone the delay of more than seven days. Put it differently, whether the provisions under Ss. 4 to 24 of the Limitation Act can be applied to the proceeding under the Act and Rules made thereunder.

7. According to R.4 of the Rules if the Magistrate is satisfied that the respondent is willfully avoiding the service or neglecting to attend the Court, the Magistrate may proceed to hear and pass an order ex parte and any order so made ex parte may be set aside for good cause shown on the application made within seven days from the date of order. The Rule does not say anything as regards to a petition if so filed, after seven days. As rightly pointed out by the learned counsel for the revision petitioner, there comes the application of S. 29(2) of the

Limitation Act to rescue the petitioner. According to S. 29(2) of the Limitation Act, where any special law or local law prescribes for any suit, appeal or application a period of limitation different from period prescribed by the Schedule, the provisions of S. 3 shall apply and the provisions contained in Ss. 4 to 24 will come into operation, in so far as, to the extent to which, they are not expressly excluded by such special law or local law. Indisputably, the Act and Rules made there under are special laws, which would come under S. 29(2) of the Limitation Act. Obviously, R.4 of the Rules prescribes a period of 7 days for filing an application to set aside the ex parte order, which is different from the Schedule, which prescribes thirty days and the application of the provisions contained in Ss. 4 to 24 of the Limitation Act are not expressly excluded either in the Act or Rules made thereunder. Therefore I find that a petition to condone the delay of more than 7 days can be entertained after a period of 7 days from the date of ex parte order, under S. 5 of the Limitation Act and such delay can be condoned on good cause shown on the application.

8. But, in the instant case, no such petition was filed along with the application to set aside the ex parte order. I find that the said defect is a curable defect only. When the substantial justice and technical consideration are pitted against each other preference must be given to the substantial justice. Therefore, the revision petitioner is allowed to file an affidavit accompanying a petition to condone the delay. Consequently, the impugned order under challenge is set aside and the matter is remitted back to the trial court. The learned Magistrate is directed to restore the application to set aside the order passed ex parte on the files. The Revision Petitioner is allowed to file a petition along with an affidavit to condone the delay. The learned Magistrate will pass orders afresh on the application and the petition at the earliest. The parties shall appear before the trial court on 1st November, 2013.

This Revision Petition is allowed accordingly.