

FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

Office Memoranda of appearance, directions and orders.	Notes, of Court's orders and Registrar's	Office Coram,	Court's or Judge's orders.
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SECOND APPEAL NO. 714 OF 2014
WITH CA/12422/2014 IN SA/714/2014

NILIMA BABAN BORDE @ NILIMA SHANTANU WAVHAL
VERSUS
SHANTANU SHIVAJI WAVHAL AND ANOTHER

...
Advocate for Appellant : Mr. P. R. Katneshwarkar,
Advocate h/f Mr. A. G. Magare.
Advocate for Respondent No.1: Mr. M. R. Sonwane.
Advocate for Respondent No.2: Mr. J. R. Shah.

CORAM: T. V. NALAWADE, J.
DATED: 8th OCTOBER, 2015.

ORDER:

1. The appeal is filed by the wife against judgment and decree of Hindu Marriage Petition No.450 of 2011, which was pending in the Court of Civil Judge, Senior Division, Ahmednagar and also against judgment and order of Regular Civil Appeal No.188 of 2013 which was pending in the Court of District Judge-2, Ahmednagar. The relief of declaration that the marriage between present Appellant, wife and the Respondent, husband is

null and void is given by the Courts below.

2. The marriage of the parties took place on 11th May, 2011. It is the case of the husband that prior to the marriage it was represented to him by the wife, who is employed, and by her relatives that her previous marriage was legally dissolved. It is contended that in the month of November, 2011 he learnt that there was no decree of divorce in respect of previous marriage of the wife. Original Respondent No.2 is the husband from first marriage of the wife. In view of these circumstances, the husband has prayed for decree of nullity of marriage under section 11 of Hindu Marriage Act, 1955.

3. The wife filed written statement and contested the matter. She contended that her first marriage with Respondent No.2 was dissolved on 31st January, 2003 by creating a registered document of divorce. It is her case that her marriage with the original petitioner was legal and there was no question of giving declaration of its nullity. Respondent No.2 of original proceedings filed similar written statement.

4. The issues were framed on the basis of aforesaid

pleadings. There was specific issue about the existence of custom of the community of the parties to dissolve the marriage by a deed of divorce and in the issue the burden of proof was shown on the wife. In the trial Court, wife produced registered document of divorce Exhibit-63 and she gave evidence that under this document the marriage was dissolved. The father of original Respondent No.2 was examined to prove that there was such custom in the community.

5. Parties are Hindus and they belong to Sali community. The record shows that the evidence of only aforesaid nature was given to prove such custom. As there was no sufficient evidence, this issue is answered by the Courts below against the wife.

6. In the first appeal, the wife had filed application under Order XLI Rule 27 of Civil Procedure Code and she had sought permission to produce copies of some deeds of divorce to show that some persons of her community had obtained divorce in similar way. On the other hand, the husband also sought permission under the same provision of Civil Procedure Code to produce some documents like decisions given by the Family Courts and

the Courts of Civil Judge, Senior Division in favour of the persons of the same community to show that the persons of the community were approaching Civil Court for obtaining divorce. These two applications were decided along with the appeal by the District Court. No permission was granted to adduce additional evidence and the appeal came to be dismissed.

7. The first Appellate Court considered the provisions of Order XLI Rule 27 of Civil Procedure Code and considered the facts and circumstances of the case. The first Appellate Court has held that sufficient opportunity was given to the wife to give evidence to prove such custom and actually some evidence was given by the Respondents of Hindu Marriage Petition proceeding. In appeal, attempt was made to produce a document of divorce obtained by father of the wife and on the basis of this circumstance the first Appellate Court has held that the wife knew as to what was required to be proved and it cannot be said that such record was not available with her.

8. The learned counsel for the Appellant has placed reliance on some observations made by the Apex Court

in the case reported as **AIR 2002 SC 971 (Yamanaji H. Jadhav V/s Nirmala)**. Learned counsel submitted that the matter can be remanded back and opportunity can be given to the wife to prove the existence of such custom. This Court has carefully gone through the facts of the reported case. In that case the wife was challenging the similar document of divorce and it was her contention that her signatures were obtained on the document under undue influence and by exercising fraud. The wife had filed suit for declaration that there was no dissolution of marriage under this document. In the said matter, no issue about the custom was framed and there was also no specific pleading about it. The Apex Court felt it necessary to allow the parties to see that evidence is given and specific issue in that regard is framed. It was done for just decision of the case and the Apex Court observed that when ordinarily, in view of the provisions of Hindu Law, such divorce cannot be obtained, it was necessary to establish that there was such custom.

9. In the present matter, in the first appeal, some record of recent time was produced by the wife and on

the other hand the husband also wanted to produce the record of decrees of divorce given by the Court. The power to allow to lead evidence in appeal is a discretionary power and the Court is required to consider the conditions which are laid down in the provision of Order XLI Rule 27 of Civil Procedure Code. In view of the aforesaid circumstance, the Appellate Court refused to grant such permission and this Court has no hesitation to observe that the first Appellate Court has not committed any error in rejecting the application. In view of these circumstances, in the second appeal, such contention cannot be accepted. Further, no material, which can be said to be sufficient even unrebutted is available to prove the existence of such custom. For proving the custom, the evidence must be sufficient to show that the practice which became custom was ancient, continuous, certain, uniform, reasonable and further it was not immoral. Now, there is a provision of law against taking of such divorce. In view of these circumstances, this Court holds that there is no material on the basis of which substantial questions of law can be formulated. There is concurrent finding on the point involved in the

matter and the law is settled on the points involved.

10. In the result, appeal stands dismissed.

11. In view of final disposal of the second appeal itself nothing further survives in the civil application for stay and the same stands disposed of accordingly.

[T. V. NALAWADE, J.]

Dt.08/10/2015
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