

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FAMILY COURT APPEAL NO. 2 OF 2014

Subodhkumar s/o Sitaram Thakur ...Appellant

versus

Mrs. Nitu w/o Subodhkumar Thakur ...Respondent

.....
Mr. V.M. Chate, Advocate for the appellant
Mr. Santosh S. Naik, advocate for respondent
.....

**CORAM : R. M. BORDE AND
V. K. JADHAV, JJ.**

DATED : 9th APRIL, 2015

PER COURT (PER V. K. JADHAV, J.):-

1. The appellant-original petitioner has filed Hindu Marriage petition bearing No. A-377 of 2011 before the learned Judge, Family Court, Aurangabad under Section 12 (2) (b-i) of Hindu Marriage Act, 1955 for annulling the marriage by decree of nullity. Being aggrieved and dissatisfied by the impugned order dated 30.10.2013, passed below Exh.1 in the said H.M.P. No. A-377 of 2011, by the learned Judge of family Court, thereby dismissing the petition, the appellant/original petitioner has preferred this appeal.

2. Brief facts, giving rise to the present appeal, are as under:-

The marriage between the parties was solemnized as per Hindu rites and customs on 25.5.2011. (Hereinafter the parties are referred to as per their status before the Family Court). It is the case of the petitioner-husband that the respondent-wife was having extra martial relations with her friend and she was also pregnant from him. Consequently, the petitioner has filed H.M.P. before the learned Judge of Family Court, Aurangabad for annulment of marriage by decree of nullity. In the said proceeding, the respondent-wife appeared in response to the notice and besides her written statement filed on record, she had also filed an application seeking interim maintenance during pendency of said petition. The learned Judge of the Family Court has partly allowed the said application, thereby directing the petitioner-husband to pay monthly interim maintenance of Rs.3000/- p.m. from the date of filing of application till disposal of said petition and also directed to pay Rs.2000/- towards travelling expanses per date as and when the respondent-wife attends the Court. However, the petitioner-husband has not complied with the directions of the Court of payment of interim maintenance amount. Thus, the learned Judge of Family Court, by its impugned order below Exh.1 in H.M.P. No. A-377 of 2011 dated 30.10.2013 dismissed the petition by invoking powers under Order 39 Rule 11 of C.P.C. Being aggrieved by the same, the petitioner-husband has

preferred instant Family Court Appeal.

3. Learned counsel for the petitioner-husband submits that the petitioner-husband has paid Rs.25,000/- to the respondent-wife in response to interim order of maintenance passed by the learned Judge of the Family Court. The petitioner-husband is also ready to pay and deposit remaining amount. The learned counsel thus submits that the impugned order is not proper, correct and legal and thus calls for interference.

4. The learned counsel for the respondent-wife submits that the learned Judge of Family Court has rightly dismissed the petition by invoking powers under Order 39 Rule 11 of C.P.C. since the petitioner-husband has not complied with the directions of Family Court to pay interim maintenance to the respondent-wife during pendency of petition.

5. As per provisions of Order 39 Rule 11 (1) of Code of Civil Procedure (Bombay Amendment), introduced in Maharashtra by notification dated 5.9.1983, the Court may dismiss the suit or proceeding if the default or contravention or breach is committed by the plaintiff or the applicant, by not following the interim directions given by the Court or strike out the offences, if the default or

contravention or breach is committed by the defendant or the opponent. Rule 11 (Bombay Amendment) of Order 39, reads as under:-

“11. Procedure on parties defying orders of court and committing breach of undertaking to the Court:-

(1) Where the Court orders any party to a suit or proceeding to do or not to do a thing during the pendency of the suit or proceeding, or where any party to a suit or a proceeding gives an undertaking to the Court to do or to refrain from doing a thing during the pendency of the suit or proceeding, and such party commits any default in respect of or contravenes such order or commits a breach of such undertaking, the Court may dismiss the suit or proceeding, if the default or contravention or breach is committed by the plaintiff or the applicant, or strike out the offences, if the default or contravention or breach is committed by the defendant or the opponent.

(2) The Court may on sufficient cause being shown and on such terms and conditions as it may deem fit to impose, restore the suit or proceeding or may hear the party in defence, as the case may be, if the party that has been responsible for the default or contravention or breach as aforesaid makes, amends for the default or contravention or breach to the satisfaction of the Court.

Provided that before passing any order under this sub-rule, notice shall be given to the parties likely to be affected by

the order to be passed.”

6. The issue, whether provisions of Order 39 Rule 11 of C.P.C. are mandatory or directory, is no more res-integra in view of the judgment delivered by the Division Bench of this Court in the case of ***Ramavatar Surajmal Modi vs. Mulchand Surajmal Modi, reported in 2004 (2) Mh.L.J. 1.*** In para 11 of the said judgment, the Division Bench has made following observations:-

“11. Applying the aforesaid observations and reasoning of the Supreme Court in M/s. Babbar Sewing Machine Co. with regard to Order 11, Rule 21 of the Code of Civil Procedure and Bimal Chand Jain with regard to Order 15, Rule 5 of the Code of Civil Procedure as amended in UP, in our considered opinion, the provision contained in sub-rule (1) of Rule 11 of Order 39 applicable in Maharashtra is directory and we hold accordingly. The view taken by the two learned Single Judges in Ratnakar D. Patade and Smt. Asha M. Joshi to the effect that Order 39, Rule 11(1) of Code of Civil Procedure is mandatory cannot be held to be laying down the correct position of law and we overrule the said decisions.”

7. The Division Bench of this court has also observed that the object of provisions of Order 39 Rule 11 (1) is not defeated if it is held to be directory as the Court can in its discretion for adequate reasons visit the defaulting party with the penalty envisaged therein.

On the other hand if the provision is held mandatory, the Court 'shall' be left with no discretion and peremptorily shall have to dismiss the suit where the plaintiff is responsible for the default or to strike off the defence when defendant is guilty of the default even though the default is not found willful or conduct of such party not obstinate or contumacious. The Division Bench has further observed that the provisions in Sub rule (1) merely vests power in the Court to dismiss the suit or proceeding where the default is by the plaintiff and strike off the defence of the defendant where the defaulter is the defendant. It does not obligate to do so in every case of default.

8. In the instant case, the learned Judge of Family Court in para 5 of the impugned order has observed that the provisions of Order 39 Rule 11 specifically state that if interim orders of the Court are not satisfied, then the petition itself can be dismissed. This approach of the learned Judge of Family Court is erroneous, against settled principles of law and contrary to the observations made by the Division Bench of this Court in the case of ***Ramavatar Surajmal Modi vs. Mulchand Surajmal Modi*** (supra).

9. The learned Judge in the impugned order itself has observed that when the respondent-wife has filed an application Exh.59 for dismissal of petition for non compliance of interim order of

maintenance, the petitioner-husband has paid her Rs.25,000/- and also sought time for making payment of arrears. On the next date of hearing, the petitioner-husband remained absent and his counsel had filed an application at Exh.61 contending that the close relative of the petitioner-husband is expired and therefore, the petitioner could not attend the Court and deposit the arrears of maintenance amount. We do not think that the petitioner-husband has been trying to flout the interim order passed by the learned Judge of Family Court and the petitioner is trying to avoid payment of arrears of the interim maintenance.

10. The petitioner-husband has also deposited Rs.50,000/- in this Court, as directed by this Court vide order dated 27.1.2015. The learned counsel for the respondent-wife submits that even then the petitioner-husband is liable to pay certain amount towards the arrears of interim maintenance. Learned counsel for the petitioner-husband submits that the petitioner-husband is ready to pay and clear entire arrears of maintenance amount within eight weeks from today. In view of this, we proceed to pass the following order:-

ORDER

- I. The Family Court appeal is hereby partly allowed.

- II. The order dated 30.10.2013, passed by the learned Judge, Family Court, Aurangabad, below Exh.1 in Hindu Marriage Petition No. A-377 of 2011 is hereby quashed and set aside and matter is remanded to the Family Court, Aurangabad.
- III. The learned Judge, Family Court, Aurangabad is directed to re-admit the H.M.P. No. A-377 of 2011 to its original number and shall proceed to decide the said petition in accordance with law.
- IV. The amount of Rs.50,000/- deposited by the petitioner-husband in this Court be transferred to the Family Court, Aurangabad and the same shall be paid to the respondent-wife.
- V. The petitioner-husband shall deposit the balance amount of arrears of interim maintenance, including travelling expenses in compliance with interim order passed by the Family Court, within a period of eight weeks from today.
- VI. The learned Judge, Family Court, Aurangabad shall dispose of the H.M.P. No. A-377 of 2011, as expeditiously

as possible and preferably within a period of six months from the date of deposit of entire amount of arrears of interim maintenance, as aforesaid.

VII. In the circumstances, there shall be no order as to costs.

VIII. The appeal stands disposed of. Decree be drawn up accordingly.

(V. K. JADHAV, J.)

(R. M. BORDE, J.)

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