

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6066 OF 2014

Meenal Nigam ... Petitioner
Vs.
Ravi Kalsi ... Respondent

Mr. R. T. Lalwani i/b. Mr. Prakash Mahadik for Petitioner.
Mr. Samarth Moray for Respondent.

CORAM : R. G. KETKAR, J.
Reserved on: **02ND MARCH, 2015**
Pronounced on: **13TH MARCH, 2015**

ORDER :

Heard Mr. Lalwani, learned Counsel for petitioner and Mr. Moray, learned Counsel for respondent at length. Rule. Mr. Moray waives service. At the request and by consent of the parties, rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, the petitioner-wife has challenged the judgment and order dated 12.06.2014 passed by the learned Judge, Family Court No.5, Mumbai below exhibit-22/A in Petition No.A-2405 of 2013. By that order, the Family Court dismissed the application made by the petitioner for delivering the judgment of divorce on admission under Order 12, Rule 6 of the Code of Civil Procedure, 1908 (for short 'C.P.C.').

3. In support of this Petition, Mr. Lalwani submitted that the petitioner-wife has instituted Petition for Divorce being M. J. Petition No.2405 of 2013 under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 (for short 'Act') on the ground of cruelty and for custody of minor son Jasraj to her. The respondent filed written statement along with the

counter claim. In paragraph 1 of the counter claim, respondent submitted that the intention of the petitioner is to torture and harass him. It was further contended that on the contrary, it is he who has suffered mental and physical agony and harassment at the hands of the petitioner and the details were set out in the counter claim. In paragraph 16, respondent contended that the marriage is now beyond any reasonable hope of reconciliation. He also prayed for dissolving the marriage under Section 13(1)(i-a) and / or (i-b) of the Act and also sought permanent custody of the minor son Jasraj.

4. The petitioner filed application in March 2014 (exhibit-22/A) for delivering judgment of divorce on admission under Order 12, Rule 6 C.P.C. In paragraph 3, she admitted that she has withdrawn from the respondent's society and deserted the respondent for a period of more than 2 years preceding the counter claim. Mr. Lalwani submitted that admission is clear and unqualified and is in terms of the requirements of Section 13(1)(i-b) of the Act. Respondent filed his reply on 07.05.2014. The reply is filed while the counter-claim is pending. He submitted that the Family Court dismissed the application on the ground that the petitioner is taking undue advantage of her own wrong. In view of Section 23 of the Act, it is well settled law that the wrong does cannot take advantage of his / her own wrong.

5. He submitted that Section 9 of the Act lays down that when either husband or wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district Court, for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. In other words,

Section 9 deals with a situation where either a husband or wife has, without reasonable excuse, deserted the other spouse. Section 13(1)(i-b) lays down that any marriage solemnized, whether before or after the commencement of the Act, may, on a petition presented by either husband or wife, be dissolved by a decree of divorce on the ground that the other party has deserted the petitioner for a continuous period of not less than 2 years immediately preceding the presentation of the petition. Thus the ground under Sections 9 and 13(1)(i-b) is one and the same namely ground of desertion. But the reliefs under Sections 9 and 13(1)(i-b) are different. He further submitted that Section 13(1-A) lays down that either party to a marriage, whether solemnized before or after the commencement of the Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of 1 year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of 1 year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties. In other words, even after passing of a decree of restitution of conjugal rights under Section 9, if there is no restitution of conjugal rights as between the parties to the marriage for 1 year or upwards, Section 13(1-A)(ii) gives right to either of the parties to the marriage to present the Petition for dissolution of marriage by a decree of divorce.

6. Mr. Lalwani submitted that the petitioner has instituted Petition for divorce on the ground of cruelty under Section 13(1)(i-a) of the Act. Even the respondent has prayed for dissolution of marriage under Section 13(1)(i-a) and / or (i-b) of the Act, namely on the ground of

cruelty or desertion. The petitioner in paragraph 3 of the application exhibit-22/A clearly admitted that she has withdrawn from the respondent's society and deserted him for a period of more than 2 years preceding the counter-claim. In other words, the petitioner has admitted in precise terms the ground of desertion as contemplated under Section 13-B of the Act. The Family Court, therefore, ought to have passed judgment of divorce on admission under Order 12, Rule 6 C.P.C. He further submitted that both the parties are claiming dissolution of marriage. In such circumstances, the best option available to the parties is to go for divorce by mutual consent as contemplated by Section 13(1) (i-b) of the Act. In any case, when the respondent is also contending that the parties are separately residing from September 2010, there is no point in proceeding with the Petition and counter-claim filed by the respondent. He submitted that in paragraph 1 of the counter-claim, respondent contended that the intention of the petitioner is to torture and harass him. It is further contended that it is he who has suffered mental and physical agony and harassment at the hands of the petitioner. In paragraph 16, it is submitted that the marriage is beyond any reasonable hope of reconciliation. In such state of affairs, the Family Court should have passed decree of divorce on an admission as contemplated by Order 12, Rule 6 C.P.C. In support his submissions, he relied upon the following decisions:

- a. **Pranjali Prasanna Bingi Vs. Prasanna Anantrao Bingi**, 2011 (1) Bom.C.R. 820;
- b. **Savitri Pandey Vs. Prem Chandra Pandey**, AIR 2002 SC 591;
- c. **Gajna Devi Vs. Purshotam Giri**, AIR 1977 Delhi 178; and
- d. **Ram Kali Vs. Gopal Dass**, (1971) ILR 1 Delhi 6.

7. On the other hand, Mr. Moray supported the impugned order. He submitted that the Family Court has rightly held that the petitioner is

trying to take advantage of her own wrong namely that she had deserted the respondent without reasonable cause and staying separate for more than 2 years. She had further admitted that she herself had deserted him without his fault, which shows that she is a wrong-doer as per Section 23 of the Act.

8. Mr. Moray further submitted that decree on admission is not a matter of right but rather discretion of a Court, which discretion must be exercised in accordance with known judicial cannons. He also relied upon Section 21 and proviso to Section 58 of the Indian Evidence Act, 1872 (for short 'Evidence Act').

9. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the petitioner has instituted Petition under Section 13(1)(i-a) of the Act for divorce on the ground of cruelty. The Petition is instituted on or about 06.09.2013. The respondent has filed written statement as also counter claim on or about 29.10.2013. In the counter-claim, respondent has sought dissolution of marriage under Section 13(1)(i-a) and / or (i-b) of the Act. In paragraph 1, it is contended by him that the intention of the petitioner is to torture and harass him. It is contended that it is he who has suffered mental and physical agony and harassment at the hands of the petitioner as detailed in the counter claim. In paragraph 16, respondent contended that the marriage is now beyond any reasonable hope of reconciliation. Petitioner has filed application exhibit-22/A under Order 12, Rule 6 C.P.C. in or about March 2014. Paragraph 3 of that application reads as under:

“3. The original Petitioner / Respondent in the Counter Claim however admits that she has withdrawn from the Petitioner's society and deserted the Petitioner for a period of more than two years preceding the Counter Claim.”

10. Perusal of paragraph 3 extracted hereinabove shows that the petitioner admitted that she has withdrawn from respondent's society and deserted the respondent for more than 2 years preceding the counter-claim. Mr. Lalwani submitted that this is a clear cut admission of petitioner of ground contemplated under Section 13(1)(i-b) of the Act. The Court, therefore, ought to have passed decree of divorce on that ground. He submitted that serious consequences flow from admission of the petitioner that she had deserted the respondent for a period of more than 2 years preceding the filing of the counter-claim. Because of her admission, she will not be entitled to claim permanent alimony also. In view of Order 12, Rule 6 C.P.C., the Family Court ought to have passed decree and dissolved the marriage.

11. In order to appreciate this submission, it is necessary to consider the provisions of Order 12, which deals with admissions. Order 12, Rule 1 lays down that any party to a Suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party. Rule 5 thereof lays down that a notice to admit facts shall be in Form No.10 and admissions of facts shall be in Form No.11 in Appendix C, with such variations as circumstances may require. Order 12, Rule 6 reads thus,

“6. Judgment on admissions.- (1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced.”

12. The above extracted provision can be analyzed as under:

(a) Where admissions of fact have been made either in the pleadings or otherwise, whether orally or in writing, (b) the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

13. In my opinion, a decree on admission is not a matter of right but rather a discretion of Court, which discretion must be exercised in accordance with known judicial cannons. Section 23(1) of the Act lays down that in any proceeding under the Act, whether defended or not, **if the Court is satisfied** that any of the grounds for granting relief exists and the petitioner [except in cases where the relief is sought by him on the ground specified in sub-clause(a), sub-clause (b) or sub-clause (c) of clause (ii) of Section 5] **is not in anyway taking advantage of his or her own wrong** or disability for the purpose of such relief then the Court shall decree such relief accordingly. *(emphasis supplied)*

14. As noted earlier, the petitioner has filed Petition under Section 13(1)(i-a) for divorce. Respondent has resisted the Petition by filing written statement and set up counter-claim claiming decree of dissolution of marriage under Section 13(1)(i-a) and / or (i-b) of the Act. It is in these circumstances, the petitioner has filed application exhibit-22/A for passing decree of divorce on admission under Order 12, Rule 6 C.P.C. In my opinion, the petitioner is obviously taking advantage of her own wrong namely that she has admitted that she has deserted the respondent for a period of more than 2 years preceding the filing of the counter-claim. In my opinion, the Family Court was justified in refusing to pass decree of divorce on admission on the ground that the petitioner is taking advantage of her own wrong. Having regard to Section 23(1)

of the Act, the Family Court was satisfied that the petitioner is taking advantage of her own wrong and accordingly declined to pass decree for divorce on admission under Order 12, Rule 6 C.P.C.

15. Apart from that, in my opinion, perusal of Order 12, and in particular Rule 6 thereof shows that if party A gives admission, it enable party B namely opposite party to request the Court to pass decree on admission of party A. In the present case, party A namely the petitioner has given admission in paragraph 3 of her application exhibit 22/A and the same party is requesting the Court to pass a decree of divorce on admission under Order 12, Rule 6 C.P.C. Having regard to Section 23(1) of the Act r/w. Order 12, Rule 6, in my opinion, this situation is not contemplated. The party who seeks decree on admission under Order 12, Rule 6 must rely upon the admission given by the opposite party and cannot seek decree on admission given by that party itself. The admission of the petitioner in paragraph 3 of the application Exhibit 22/A is a self-serving. Mr. Lalwani relied upon decision in the case of **Pranjali Bingi** (*supra*). In that case, this Court held that on a Petition for divorce, the Court has to record its satisfaction under Section 23 of the Act, even if Petition is undefended. In other words, in the proceedings under the Act, the Court can arrive at the satisfaction contemplated by Section 23 on the basis of legal evidence in accordance with the provisions of the Evidence Act and it is quite competent for the Court to arrive at the necessary satisfaction even on the basis of the admissions of the parties alone. Admissions are to be ignored on grounds of prudence only when the Court, in the circumstances of a case, is of opinion that the admissions of the parties may be collusive. In paragraph 10 of that judgment, the learned Single Judge of this Court observed that merely because both the parties have prayed for same reliefs of divorce, on the basis of different set of facts, the Court does

not get jurisdiction to pass order under Order 12, Rule 6 C.P.C. In my opinion, this decision supports the contentions of the respondent.

16. In the case of **Savitri Pandey** (*supra*), the Apex Court held that in any proceedings under the Act whether defended or not the Court would decline to grant relief to the petitioner if it is found that the petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated under Section 23(1) of the Act. No party can be permitted to carve out the ground for destroying the family which is the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties. In the case of **Gajna Devi** (*supra*), the wife had presented a Petition for judicial separation under Section 10 of the Act on 05.11.1965. It was ex-parte decreed on 30.03.1966. The husband instituted Petition for divorce under Section 13(1-A) on 19.07.1972. The decree for divorce was passed under Section 13 (1-A). In that case the question that was agitated before the Single Judge of the Delhi High Court was that Section 23(1) of the Act prohibits the Court from granting the relief to the husband if he is taking advantage of his own wrong. The said contention was negated on the ground that the expression “petitioner is not in any way taking advantage of his or her own wrong” occurring in clause (a) of Section 23(1) of the Act does not apply to taking advantage of the statutory right to obtain dissolution of marriage which has been conferred on him by section 13(1-A) of the Act subsequent to the passing of the decree for judicial separation or restitution of conjugal rights. In such a case, a party is not taking advantage of his own wrong, but of the legal right following upon of the passing of the decree and the failure of the parties to comply with the decree or resumption of cohabitation after its

passing.

17. In the case of **Ram Kali** (*supra*), similar contention was advanced. Mr. Lalwani relied upon paragraph 12 of that report and submitted that the object of Section 13(1-A) is in consonance with the modern trend not to insist on the maintenance of union which has utterly broken down. It would not be a practical and realistic approach, indeed it would be unreasonable and inhuman, to compel the parties to keep up the facade of marriage even though the rift between them is complete and there are no prospects of their ever living together as husband and wife. In that case, appellant had obtained decree for restitution of conjugal rights against the respondent on 17.03.1961. Respondent thereafter filed a Petition under Section 13(1-A)(ii) for decree of divorce against the appellant on 23.01.1965. The ground on which the respondent sought dissolution of marriage by a decree of divorce was that there had been no restitution of conjugal rights after passing of decree on 17.03.1961. The trial Court held that there was no restitution of conjugal rights after passing of the decree dated 17.03.1961. In appeal, the learned Single Judge confirmed the finding of the trial Court that there has been no restitution of conjugal rights after passing of the decree on 17.03.1961. After considering Section 13(1-A) of the Act, the Full Bench observed that the effect of that Section was that not only the spouse in whose favor a decree for judicial separation or for restitution of conjugal rights had been granted was entitled to present a petition for dissolution of marriage but even the other spouse against whom the decree for judicial separation or for restitution of conjugal rights had been awarded was also clothed with the right to present such a petition. In paragraph 11, the Full Bench considered argument that the awarding of a decree of divorce under sub-section 13(1-A) in favour of a spouse against whom an earlier decree for judicial separation or restitution of

conjugal rights had been awarded would run counter to clause (a) of sub-section (1) of Section 23 of the Act, inasmuch as the defaulting spouse would be taking advantage of his or her own wrong and it was not accepted. It was further observed that despite such a wrong or failure on the part of the defaulting spouse, the legislature has given a right by the amending Act to the defaulting spouse to apply for a decree of divorce if the other conditions mentioned in sub-section (1A) are fulfilled. In my opinion, the decisions in **Gajna Devi** (*supra*) and **Ram Kali** (*supra*) are not applicable. In **Gajna Devi's case**, decree of judicial separation was passed on 30.03.1966. The husband contended that there was no resumption of cohabitation for a period of 2 years and upwards. In **Ram Kali's case**, decree for restitution of conjugal rights was passed on 17.03.1961 and that there was no restitution of conjugal rights. In both the cases, divorce was thereafter sought under Section 13(1A). The facts are materially different from the present case.

18. Mr. Moray relied upon Section 21 and proviso to Section 58 of the Evidence Act. Section 21 lays down that admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the cases covered by-

- (1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.
- (2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is

accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

19. Section 58 lays down that facts admitted need not be proved. Proviso thereto lays down that the Courts may, in its discretion, require the facts admitted to be proved otherwise than by such admissions. Order 8, Rule 5 C.P.C. provides that allegation of fact in the plaint has to be specifically denied. Proviso to sub-rule (1) thereof lays down that the Court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. I have already held that the admission of the petitioner in paragraph 3 of the application, exhibit-22/A is a self-serving admission.

20. In the case of **Bai Kanku Vs. Shiva Toya**, 17 Bmbay 624 (F.B.), the Full Bench of this Court held that a decree for dissolution of marriage cannot be made merely on admissions and without recording any evidence. In the case of **Sushila Mahendra Nanavati Vs. Mahendra Manilal Nanavati**, AIR 1960 Bombay 117, the Division Bench of this Court held that under Order 8, Rule 5, it is well settled that both the plaintiff as well as the defendant must be held bound by the statement of facts in their respective pleadings. But under the proviso to Order VIII, Rule 5, the Court may, in its discretion require any fact admitted to be proved otherwise than by such admission. The proviso to Section 58 of the Evidence Act is also to the same effect. In matrimonial proceedings, there can be no judgment by default or admission. Even in the case of **Pranjali Bingi** (*supra*), the learned Single Judge of this Court held in paragraph 10 that merely because both the parties have prayed for same reliefs of divorce, on the basis of different set of facts, the Court does not get jurisdiction to pass order

under Order 12, Rule 6 C.P.C.

21. In the light of the aforesaid discussion, I am of the opinion that the reliance placed by Mr. Lalwani on the above-referred decisions does not advance the case of the petitioner. In my opinion, the Family Court was right in holding that the petitioner was trying to take advantage of her own wrong. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed. Rule is discharged. In the circumstances, however, there shall be no order as to costs.

22. At this stage, Mr. Lalwani orally applies for stay of further proceedings of Petition No.A-2405 of 2013 as also the counter claim filed by the respondent therein for a period of eight weeks from today. Mr. Moray opposes this application on the ground that during the pendency of this Petition, there was no stay.

23. Having regard to the fact that the petitioner intends to challenge this order before the higher Court, I find that the request made by Mr. Lalwani is reasonable. Hence, notwithstanding dismissal of the petition, further proceedings of Petition No.A-2405 of 2013 as also the counter-claim filed by the respondent therein, shall remain stayed for a period of eight weeks from today.

(R. G. KETKAR, J.)

Minal Parab