

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER NO. 252 OF 2014
WITH
CIVIL APPLICATION NO. 295 OF 2014 IN A.O. NO. 252 OF 2014**

Kisan Bhavasing Rathod ... Appellant/Applicant

Vs.

Jyoti Kisan Rathod ... Respondent

Mr. Suhas S. Inamdar, Advocate for the appellant/applicant.

Mr. Samir Kumbhakoni, Advocate for the respondent.

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 25th January, 2016.

P.C.:

The learned counsel for both the sides informed that the settlement is not possible between the parties.

2. This Appeal from Order is preferred against the judgment and order dated 3rd December, 2013 passed by the learned District Judge-2, Solapur in Regular Civil Appeal No. 372 of 2012 thereby setting aside the judgment and decree passed by the Civil Judge Senior Division, Solapur in H.M.P No. 198 of 2008 dated 20th January, 2011 and remanding the matter back to the trial Court for fresh hearing.

3. The appellant is a husband, who has filed H.M.P No. 198 of 2008 for divorce on the ground of cruelty under section 13(1)(ia) of the Hindu

Marriage Act. Notice was served on the respondent/wife and the date was fixed for appearance on 26th August, 2008. She appeared on that day and gave an application for adjournment. The matter was adjourned to 16th September, 2008. She was represented by a counsel appointed from the panel of legal aid. However, on 3 to 4 dates, adjournment was sought by the counsel from legal aid. The respondent did not appear. No WS order was passed and thereafter H.M.P. was decided ex-parte and divorce under the ground of cruelty was granted in favour of the appellant. The said judgment was challenged before the District Court in Appeal and the District Court set aside the judgment and order mainly on the ground that the respondent/wife was not given fair opportunity to put up her say and argue her matter and as the issue pertains to the civil rights of the respondent/wife, it is to be heard on merit. Hence, this Appeal.

4. The learned counsel for the appellant submitted that the order of remand is bad in law and no such order was required, as the notice was served on the respondent and the respondent had appeared through the counsel in the proceedings before the trial Court. The learned counsel submitted that the stand of the respondent that she was not properly served, is not correct. He submitted that the Appeal is not remanded on the ground of fraud. The learned counsel pointed out photocopies of the

relevant documents, i.e., report of the bailiff on the point of service of notice, so also the photocopy of Vakalatnama filed by Advocate Nandini Kinikar for the legal aid. He pointed out that adjournment applications filed by Advocate Nandini Kinikar on 16th September, 2008, 13th October, 2008, 20th December, 2008 and also No WS order passed by the trial Court on 16th June, 2009. He submitted that sufficient opportunity was given to the respondent/wife to appear before the Court and give her say, however, she chose not to file WS. He submitted that the order of remand is illegal. This matter be sent to the District Court, as the service was proper and the District Court be directed to decide the matter.

5. The learned counsel for the respondent opposed the submissions of learned counsel for the appellant. He submitted that a fraud was played on the respondent/wife. He pointed out that Vakalatnama filed before the trial Court discloses that the signature of the respondent is in kannada and the respondent does not sign in Kannada script. He further submitted that respondent was not properly represented by the counsel before the trial Court, therefore, he supported the order passed by the learned District Judge.

6. Perused the record produced, so also the orders passed by both the

subordinate Courts. The signature in Vakalatnama appears to be in Kannada. Assuming that respondent/wife knew Kannada and she might have signed in Kannada, however, Advocate Nandini Kinikar who represented respondent/wife before the trial Court and who had filed applications for adjournment on 3 to 4 occasions, did not take efforts to get No WS order set aside. Moreover, the counsel did not remain present when the matter was argued by the counsel for the appellant/husband and the judgment was delivered.

7. When the advocate from the panel of Legal Aid is appointed to defend the litigation and fails to appear for the litigants during the trial or in the proceedings, it is the duty of the Court in charge of the matter to remove that advocate from the panel of legal aid especially when the party is not present and to appoint another counsel to represent the party who wants to avail of the legal aid. In the present case, the learned Judge should have removed the counsel and appointed another counsel from the legal aid panel. So, I am of the view that even assuming that the counsel has filed Vakalatnama through the legal aid, the respondent was not properly represented and therefore, she was not heard at all in this matter. The learned District Judge has rightly observed that this is a divorce case where the civil rights of the respondent/wife are going to be affected.

Hence, this issue requires proper adjudication only after hearing both the sides. Hence, the order of the District Court is upheld. Appeal from Order is dismissed. Civil Application is also accordingly disposed of.

8. The learned counsel for the appellant prays to stay the operation of this order, as he wants to challenge this order before the Hon'ble Supreme Court. In view of this, the operation of this order is stayed till 22nd February, 2016. If no steps are taken, the parties to appear before the trial Court on 29th February, 2016 and the trial Court to decide the matter.

(MRIDULA BHATKAR, J.)