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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL No. 42 OF 2016

Mr. Niklesh Anil Rodrigues ... Appellant

Vs.

Mrs. Rachelle Anne Ornillo Montero ... Respondent

Mr. Dharmesh Jain i/b Melwyn Pereira, for the Appellant.

Ms. Pranjali Bhandari, for the Respondent.

CORAM : V. M. KANADE, &
Mrs. SWAPNA S. JOSHI, JJ.

DATE : SEPTEMBER 27, 2016

PC.

1. Appeal is taken up for final hearing by consent of the learned counsel appearing for both the parties. Heard the learned counsel appearing for the Appellant and the Respondent.

2. Both the parties are aggrieved by a judgment and order dated 28th October, 2015, passed by the Family Court, Mumbai at Bandra, in an application filed under Section 18 of the Foreign Marriage Act, 1969 read with Section 27(1)(b) and (d) of the Special Marriage Act, 1954 (for short “the said Act”). The Petitioner was a Hindu and the Respondent was a Muslim at the time of marriage and

they got married as per the provisions of the Foreign Marriage Act, 1969. The petition, however, was filed under Special Marriage Act, 1954, as also under the Foreign Marriage Act, 1954, and reliance was placed on Section 31 of the said Act.

3. After the Respondent was served, she filed a reply and stated that she has no objection if the decree of divorce is granted in favour of the Petitioner / Appellant. She is residing in Philippines. She was then interviewed by the marriage counselor on video conferencing. In the said session also she had stated that she had no objection if decree of divorce is passed and the petition for divorce is allowed. She had also stated that she did not claim any maintenance for herself and she will not claim maintenance in future. There is no child from their marriage. The Family Court, however, came to a conclusion that the Family Court did not have jurisdiction to entertain the petition for divorce, and also observed that the Petitioner could not convert the petition into a petition for divorce by mutual consent.

4. Being aggrieved by the said judgment and order, the Petitioner / Appellant has filed the present appeal. The Respondent was served and she has written a letter to the Registrar General, which

has been placed before us, in which she has stated that she has no objection if decree of divorce is passed.

5. A short question which falls for the consideration of this Court is - whether the Family Court, Mumbai has jurisdiction to entertain the petition for divorce? It is quite well settled position that jurisdiction of the Court in a petition, seeking divorce or any other relief, is found in Section 31 of the said Act. It would be relevant and profitable to have a look at the said section, which reads as under:

“31. Court to which petition should be made

(1) Every petition under Chapter V or Chapter VI shall be presented to the district court within the local limits of whose original civil jurisdiction-

(i) the marriage was solemnized ; or

(ii) the respondent, at the time of the presentation of the petition resides ; or

(iii) the parties to the marriage last resided together; or

[(iii-a) in case the wife is the petitioner, where she is residing on the date of presentation of the petition; or]

(iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time residing outside that territories to which this Act extends, or has not been heard of as being alive for a period of seven years by those who would naturally have heard of him if he were alive.]

- (2) Without prejudice to any jurisdiction exercisable by the court under sub-section (1), the district court may, by virtue of this sub-section, entertain a petition by a wife domiciled in the territories to which this Act extends for nullity of marriage or for divorce if she is resident in the said territories and has been ordinarily resident therein for a period of three years immediately preceding the presentation of the petition and the husband is not resident in the said territories.”

The Family Court has observed that case of the Petitioner does not fall in any of the clauses of the said section.

6. In our view, the learned Judge of the Family Court clearly overlooked one important material fact that though the Petitioner / Appellant herein is residing in Dubai at the moment for the purpose of service, he is permanently residing in Mumbai. The Appellant has annexed a copy of his passport and all other relevant documents, which show that he is permanent resident of India and he is an Indian citizen. He has produced the material on record to show that he comes to Mumbai very often to meet his mother. The petition was presented by him in person, though the Family Court wrongly observed that petition was not presented by him. The Petitioner was, in fact, present when the petition was tendered before the registry of the Family Court.

7. The learned counsel appearing on behalf of the Respondent has submitted that the Respondent had informed that she has no objection if the decree for divorce is passed, though a written-statement was filed by the Respondent in the Family Court.

8. The Apex Court in the case of – ***Smt. Satya, Appellant Vs. Teja Singh, Respondent*** reported in ***AIR 1975 Supreme Court 105*** had an occasion to consider the issue regarding the domicile and whether Indian Courts could set aside the foreign judgment under Section 13(a) of the Civil Procedure Code. In the said case, the husband had gone to the state of Nevada in U.S.A. for the purpose of obtaining a degree from the college. While he was staying there, he filed a petition for divorce and obtained an *ex parte* decree in the Court of Nevada. The wife filed a petition in the Indian Court, and challenged the said foreign decree. The Apex Court then considered the law on the point and came to a conclusion that the husband was residing temporarily in Nevada and he was not a permanent resident. The ratio of this judgment squarely applies to the facts of the present case. We are of the view that the learned Judge of the Family Court has misinterpreted the provisions of Section 31 of the said Act and has

not taken into consideration the meaning of the terms “ordinarily residing” and “permanently residing”, and also the word “domicile”.

9. We, therefore, set aside the impugned order passed by the Family Court, since the Respondent has never appeared before the Family Court despite the service, and we are informed by her counsel that she is not willing to come to this Court or file any affidavit. We are, therefore, of a view that the petition for divorce can be converted into a petition for divorce by mutual consent under Section 28 of the said Act on the oral application of both the learned counsel who are before us, and accordingly leave to amend is granted to convert the petition for divorce into a petition for divorce by mutual consent. At the moment, the Petitioner is in Dubai and the Respondent is in Philippines. We are informed that wife is not likely to come to India, and it is alleged that she has remarried. The presence of the Petitioner / Appellant herein and the Respondent is therefore dispensed with.

10. This Court, in the case of ***Santosh Lalmani Tiwari Vs. Aradhana Devi Santosh Tiwari [2013(1) Mh. L. J. 253]*** held that when an application is filed for converting the petition for divorce into

a petition for divorce by mutual consent at the appellate stage, it is not necessary to wait for a period of six months, which is a mandatory period, during which period the petition is kept in abeyance. In view of the ratio of the said judgment, we are of the view that it is not necessary to wait for a statutory period of six months, and therefore, the petition can be allowed. We, therefore, allow the petition for divorce by mutual consent, and the marriage between the Petitioner / Appellant and the Respondent is hereby dissolved by consent under the provisions of Section 28 of the said Act.

11. We are informed that the Respondent is not claiming maintenance. In any way, we do not propose to decide the said issue since the consent terms have not been filed by both the parties. It is submitted that all allegations made by both the parties against each other are withdrawn. The appeal is accordingly allowed and disposed of in the aforesaid terms. It is clarified that the aforesaid order has been passed in the peculiar facts and circumstances of the case, and may not be treated as a precedent.

Sd/-

[Mrs. SWAPNA S. JOSHI, J.]

Sd/-

[V. M. KANADE, J.]