

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FAMILY COURT APPEAL NO.81 OF 2016
IN
PETITION APPLICATION NO.91 OF 2010**

Mrs.Rupali Sanjeev Abnave Appellant

versus

Mr.Sanjeev Sudamrao Abnave ... Respondent

Mr.R.S. Apte, Senior Advocate i/b. Mr.Sagar Ambedkar for the
appellant (wife).

Mr.Abhijit Dilip Sarawate, advocate for the respondent (Husband).

**CORAM : A.S.OKA & A.M.BADAR, JJ.
DATE : 25th NOVEMBER, 2016.**

ORAL JUDGMENT (PER A.S. OKA, J.)

1. By consent of the learned counsel appearing for the parties, the appeal is taken up for final disposal at the admission stage. The appellant/wife filed a petition seeking divorce before the Family Court, at Pune. The prayer in the said petition apart from seeking dissolution of marriage was for grant of maintenance of Rs.8,500/- per month to the minor child Master Piyush who is born on 18/02/2004. There was a joint pursis filed by the appellant and respondent on 06/10/2012 at Exhibit 83 which

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records the agreed arrangement for grant of access to the respondent/husband to enjoy company of the minor child. On the very day, learned Judge of the Family Court passed an order on the said pursis directing the parties to follow the Consent Terms (pursis). An application was made by the respondent/husband at Exhibit 119 invoking the power of the Court under Rule 11 Order XXXIX of the Code of Civil Procedure, 1908 (for short “the said Code”). By the impugned order, the learned Judge of the Family Court allowed the said application. The learned Judge proceeded to dismiss the petition for divorce filed by the appellant on the ground that the appellant has committed the breach of the order passed on the pursis at Exhibit 83. There is a counter claim filed by the respondent/husband in the said petition for restitution of conjugal rights. The learned Judge proceeded to strike off the defence of the appellant to the counter claim on the same ground.

2. Various submissions are made by the learned senior counsel for the appellant in support of the Family Court Appeal. His submission is that there is no material on record showing that

there was a willful disobedience of the order of the Family Court by the appellant. He has submitted that in fact there is no such specific finding recorded by the learned Judge of the Family Court. He relied upon the decision of this Court dated 09/12/2014 in Family Court Appeal No.20/13, in the case of Mrs.Kavita Krishnamurthy, versus, Mr.K.N. Krishnamurthy. The learned senior counsel relied upon affidavit dated 25/11/2016 filed in this appeal in support of his case. The said affidavit has been filed in terms of directions of this Court dated 23/09/2016.

3. Learned counsel appearing for the respondent supported impugned order by pointing out that the reply filed by appellant to the application at Exhibit 119 is very vague. He pointed out the specific pleadings in the application at Exhibit 119 and in particular paragraph No.14 thereof. He pointed out that the particulars of dates on which access was allowed and the particulars of the dates on which access has been denied, have been clearly set out in the said paragraph. He submitted that the averments made in the said paragraph have not been dealt with in

the reply filed by the appellant. He pointed out photographs which are produced alongwith application at Exhibit 119 and pointed out that on the basis of said uncontroverted photographs, the learned Judge of the Family Court has recorded a finding that child was always comfortable in the company of the respondent/father. He submits that the said photographs were never disputed and the learned Judge of the Family Court was justified in relying upon the said photographs. Learned counsel for respondent invited our attention to the additional affidavit of the appellant. On instructions he states that the statement made in paragraph No.3 that the respondent was out of India from 10/03/2014 to 18/04/2014, is factually incorrect. He invited our attention to the copies of the chits annexed to the said affidavit for pointing out the manner in which the respondent is referred by the appellant. He urged that there is a consistent breach committed by the appellant of the order dated 06/10/2012. He submitted that even after passing the impugned order, the breach continues.

4. We have carefully considered the submissions. The

power of the Court under Order 11 Rule XXXIX of the said Code is always discretionary. The power can be exercised only when it is proved that there is a willful breach or disobedience of the order of the Court by a party or a willful breach of any undertaking given by a party. The order contemplated by Rule 11 Order XXXIX is a very drastic order, which results into a dismissal of the proceedings filed by the party who has committed the breach. It is not necessary that in every case after finding that there is a willful breach of an order or a breach of an undertaking, the drastic power under Rule 11 of Order XXXIX of the said Code should be exercised. The power is discretionary. The discretion is to be exercised on the basis of the material on record.

5. We have perused the pursis at Exhibit 83 and the order passed thereon. We have also perused averments made in the application under Rule 11 Order XXXIX of the said Code filed by the respondent on the basis of which the impugned order has been passed. It is true that details of the dates on which access is not provided have been set out therein. It is also true that the reply

filed by the appellant does not specifically deal with the averments made in each and every paragraph of the said application filed by the respondent.

6. We have minutely perused the impugned order. Paragraph Nos.8 and 9 of the impugned order are the findings recorded by the learned Judge of Family Court which read thus:

“8. I have considered the rival contentions and arguments of both the parties. Access of child for total 132.5 days was required to give to the respondent as per order below joint pursis Exh.83. It is the contention of the petitioner-wife that she has given access, but not produced any proof to show that she has given access of the child to the respondent as per order passed below Exh.83 except her version. Therefore, it clearly establishes that the petitioner has willfully not given access of the child to the respondent for continuous period two years i.e. total 132.5 days which is calculated as per the school calender of the child. The learned advocate of the respondent has submitted that the respondent has taken the child to Mumbai in A.C. Bogi which is permitted to him to travel by Indian Railway as he is the employee of Indian Railway. The respondent has produced some

photographs in which the child is shown eating food, drinking coconut water, reading books, sitting with grand-father, father etc. In not a single photograph the child is crying. Therefore, the submission of the learned advocate of the petitioner that the child was not happy and fell ill while he was in the custody of the respondent due to providing substandard food and water is not believable and true.

9. *The respondent has produced call details with pursis Exh.124. The record shows that initially the phone access were given to the respondent property. But thereafter i.e. after April, 2015 one minute or few second phone access was given. It shows that the petitioner is also creating obstruction to give phone access to the child after April-May 2015. After considering it all, it becomes crystal clear that the petitioner-wife has willfully disobeyed the order of the access of child for total 132.5 days. Therefore, in these circumstances, it is necessary to invoke powers provided under Order 39 Rule 11 of the Code of Civil Procedure. It is well settled law that as per the provisions Order 39 Rule 11 of the Code of Civil Procedure that if the defaulting party is the petitioner, then the petition would be dismissed and if the defaulting party is the respondent, then the defence would be struck*

off. In the present case in hand the petitioner-wife is the defaulting party, therefore, her petition is required to be dismissed and in the counter-claim the defaulting party is the wife (petitioner), hence her defence is required to be struck off. In view of above discussion, my opinion is that the respondent has proved that the petitioner-wife has willfully disobeyed the order of access. Therefore, I answer point No.1 in the affirmative.”

7. In paragraph No.8, the learned Judge has recorded the submission of the advocate appearing for the appellant that the child was not happy and he fell ill when he was in the custody of the respondent. The learned Judge has referred to photographs produced by the respondent which according to the learned Judge show that the child is seen drinking coconut water, reading books etc., in the company of the respondent/father and the photographs do not show that the child is crying. We have perused the application made at Exhibit 119 by the respondent. We also perused the affidavit in support of the said application filed by the respondent. As conceded by the learned counsel for the respondent, neither in the application nor in the affidavit in support, even a reference to the photographs has been made by

the respondent. Averments made in the application Exhibit 119, in particular paragraph Nos.9 to 11, show that on various dates set out therein, the respondent enjoyed the company of the minor son. Allegations of breach are in respect of certain days in the period between January 2014 to January 2016. There is no pleading by the respondent as regards to the dates on which photographs referred in the impugned order were taken. As stated earlier the photographs were not relied upon either in the application at Exhibit 119 or in the affidavit in support. Hence, the appellant had no opportunity to deal with the photographs. Therefore, in our view, only on the basis of the said photographs, the learned Judge of the Family Court could not have rejected the contention of the appellant that the child was not happy in the company of the respondent. If it is established that the child was not happy in the company of the respondent, and therefore, access could not be provided, obviously the Court could not have recorded a finding of the willful breach on the part of the appellant/wife. Therefore, the learned Judge has committed an error when he has rejected the argument of the appellant that the child was not happy in the

company of the respondent only on the basis of the photographs. The learned Judge has recorded a finding that the appellant has not willfully given access to the child to the respondent for continuous period of 132.5 days.

8. We have carefully perused the paragraph No.9 of the impugned order. Only on the basis of the call details the learned Judge has recorded a finding that the respondent has created obstruction to give phone access to the child after April-May 2015. After recording this finding, the learned Judge has jumped to the conclusion that it becomes crystal clear that the appellant/wife has disobeyed the order dated 06/10/2012.

9. It is not in dispute that the learned Judge has not interviewed the child before passing the impugned order. We may also note here that in the petition filed by the appellant, there was a prayer for grant of maintenance for the benefit of the child. While dismissing the petition filed by the appellant, the learned Judge has dismissed the same in its entirety. The prayer for maintenance was for the benefit and welfare of the minor. The

said prayer could not have been dismissed, as even according to finding recorded by the learned Judge, the default was on the part of the mother and not on the part of the child. This aspect also shows non-application of mind.

10. As observed earlier, even if the learned Judge was of the view that there is a deliberate breach on the part of the appellant/wife, the learned Judge should have applied his mind whether discretionary power under Rule 11 of Order XXXIX deserves to be exercised in the facts of the case.

11. In our view, the findings recorded in paragraph Nos.8 and 9, do not justify passing of such a harsh order.

12. As the submission of learned counsel for the respondent is that even after the impugned order, the appellant has not abided by the order dated 06/10/2012, we deem it proper to remit the matter for fresh consideration by the learned Family Court. We propose to grant liberty to respondent to file

supplementary application/supplementary affidavit for placing additional facts on record. We also propose to grant liberty to appellant/wife to file an additional reply to application at Exhibit 119 and to deal with additional affidavit which may be filed by the respondent/husband. We may clarify that if an application is made by the parties for seeking permission to adduce oral evidence, if the learned Judge is satisfied that it is necessary to permit the parties to adduce evidence, it is open for learned Judge to pass an order to that effect. We make it clear that it is not necessary that in every case where an application under Rule 11 Order XXXIX of the said Code is made that the parties should be permitted to adduce oral evidence.

13. Hence, following order is passed:

ORDER

- (1) The impugned judgment and order dated 15/03/2016 is hereby quashed and set aside and the application at Exhibit 119 in Petition No.PA/91/2010 is restored to the file of the learned Judge, Family Court, Pune;

- (2) We direct the parties to appear before the learned Judge of the Family Court on Monday 19/12/2016 at 11.00 a.m. It will be open for the appellant to file supplementary application/supplementary affidavit for placing on record additional facts/subsequent events;
- (3) Such additional application or additional affidavit shall be filed by the appellant on the date fixed for appearance. Additional reply to the application Exhibit 119 and the additional application/additional affidavit, if any, shall be filed by the appellant within a period of one month thereafter;
- (4) If an application is made by any of the parties seeking permission to lead oral evidence, subject to what is observed above, the learned Judge will consider the said application in accordance with law;
- (5) Since the issue concerns the access to meet the minor child, the learned Judge shall give necessary priority to the disposal of the application Exhibit 119.
- (6) All contentions of the parties on merits of the said application are kept open;

- (7) The hearing of the counter claim of the respondent shall not proceed till the application at Ex.119 is disposed of;
- (8) The appeal is partly allowed on the above terms with no order as to costs;
- (9) Writ of this order be forwarded to the concerned Court immediately.
- (10) Pending Civil Application does not survive and the same is disposed of.

(A.M. BADAR, J.)

(A.S. OKA, J.)