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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 217 OF 2015

Daisy Langrana Sahai

.. Appellant
(Org. Petitioner)

Versus

Abhishek B. Sahai

.. Respondent

Mr. Charmaine Bocarro i/by Mr. Vivek Sharma for appellant.
Mr. Vikramaditya Deshmukh for respondent.

CORAM: NARESH H. PATIL &
PRAKASH D. NAIK, JJ.

RESERVED ON : AUGUST 05, 2016.

PRONOUNCED ON : SEPTEMBER 08, 2016

ORDER [Per Naresh H. Patil, J.] :

1. This appeal is directed against the judgment and decree dated 13/3/2015 passed by the Family Court No. 7, Bandra, Mumbai, in Petition No.B-21 of 2014.

2. The appellant-wife herein is petitioner before the Family Court. She filed a petition against the respondent-husband under Section 34 of the Specific Relief Act, 1963 for declaration of their marriage as void ab initio. In brief, the appellant herein contended before the Family Court that she is Zoroastrian by faith since birth. She never got converted to or adopted Hinduism. The appellant and respondent were undergoing training in Oberoi Hotel in the year 2003. They became friends and later on decided to get married. After consulting their parents, they decided to perform marriage ceremony by following vedic rites at the hands of a Pandit. The marriage was performed on 30/6/2006 at Lucknow. One child, namely, Yashawardhan, was born out of the marital tie of appellant and respondent. Presently the child is aged about 4 years.

3. It is the appellant's contention that she was under bonafide belief that religious ceremony conducted on 30/6/2006 was a valid marriage as per the Hindu Marriage Act, 1955. The appellant is a Parsi by religion and follows Zoroism. Initially, the couple resided in New Delhi and after their transfer, they came to Mumbai and started residing at the residence of mother of appellant for couple of years. There arose some disputes between the appellant and respondent and, therefore, they decided

to start staying separately from each other. The appellant started living separately with her son. There was no cohabitation between the parties since January, 2011. The parties are staying separately since 5/1/2011. According to the appellant, their marriage was irretrievably broken down due to disputes and differences. The respondent filed his say/written statement below Exhibit 12. The respondent admitted as true and correct whatever stated by the appellant and he further stated that he does not want to contest the petition and prayed for appropriate order.

4. The Family Court, in view of Section 9 of the Family Court Act, made attempts for settlement/reconciliation between the parties. The said attempts failed. Therefore, the petition was taken up for decision on merits. The Family Court framed following points : -

- (1) Does the petitioner proved that, at the time of marriage she was not Hindu?
- (2) Does the petitioner prove that their marriage is void, hit by provisions of Section 5 of Hindu Marriage Act?
- (3) Does the petitioner entitled for decree?

5. The appellant placed on record invitation card of the marriage. The school leaving certificate issued by Tolani College of Commerce, Andheri (E), Mumbai was submitted by the appellant in support of her contention that she is Parsi by religion. The Family Court observed that the oral testimony of the appellant shows that the respondent is Hindu by birth and still continues to be Hindu. The appellant has not placed any documentary evidence to show that respondent is a Hindu or is professing Hinduism since birth. But the Family Court held that the respondent is Hindu by religion as the fact was admitted by the respondent in his say/written statement. In para 13 of the judgment, the Family Court observed as under :-

“13. The pleading of petitioner shows that she was stayed initially at New Delhi alongwith respondent and thereafter she had stayed couple of years at the residence of mother of petitioner. The pleading in para No.4 of the petition shows that there were dispute and differences between petitioner and respondent and they could not get each other in time therefore, petitioner has decided to part her ways. This fact pleaded by the petitioner shows that after long cohabitation she had changed her mind as there was dispute and differences between them. Change of mind is not good ground for grant of relief for declaration.”

6. In para 16 of the judgment, the Family Court observed that the petition filed by the appellant is barred by limitation. According to the Family Court, the period of limitation under Articles 58 and 113 of Limitation Act is three years from the date of right accrued to sue, which had already expired in this case. Merely change of mind does not provide a ground for declaration, according to the Family Court. The Family Court observed in para 18 of the judgment that from the written statement and act of respondent, it appears that the parties want to bye-pass the procedural requirement as they are in collusion. It was further observed that in case there is a collusion, then the parties are not entitled to any relief. Therefore, the petition filed by the appellant came to be dismissed.

7. Learned counsel appearing for the appellant/petitioner submitted that in view of the pleadings and the affidavit of examination-in-chief submitted by the appellant, the Family Court ought to have allowed the petition under Section 34 of the Specific Relief Act in view of the provisions of Order XII Rule 6 of the Civil Procedure Code as the respondent had admitted the contentions and statements made in the pleadings by the appellant in the Family Court by filing a say/written statement. As the provisions of Order XII Rule 6 are attracted, the Family

Court had no option than to pass decree on admission. Learned counsel placed reliance on the judgment of the Apex Court in the case of Gullipilli Sowria Raj vs. Bandaru Pavani @ Gullipilli Pavani [**AIR 2009 SC 1085**] and the provisions of Order XII Rule 6. Learned counsel appearing for the respondent supported the contentions of the appellant.

8. We have perused the record placed before us, considered the submissions advanced before us. The Family Court observed in para 16 that the petition is barred by limitation. In the facts, we are of the view that the Family Court ought to have framed an issue concerning the limitation. The Family Court has failed to do so.

9. The Family Court had observed that the parties want to by-pass the procedural requirement and had colluded by making admissions in the pleadings. These observations are not warranted in the absence of there being any issue framed and parties are called upon to lead evidence. The Family Court further observed that mere change of mind would not be a ground for seeking declaration.

10. From the submissions advanced before us and the pleadings

before the Family Court, it is clear that the parties have approached the court stating that the appellant was a Parsi and respondent was a Hindu on the date of marriage, so their marriage was null and void and was performed contrary to the provisions of the Hindu Marriage Act. This is the substantive issue which the Family Court ought to have addressed.

11. During the course of hearing before this court, it was submitted that in view of the consenting written statement submitted and admission made by the respondent that there is no other option left with the court to pass a decree in view of provisions of Order XII Rule 6 of C. P. C. Rule 6 of Order XII reads as under:-

“ORDER XII

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. We are of the view that the judgment on admissions is not a matter of right. It is a matter of discretion of the court to be exercised judiciously and depending upon the facts and circumstances of the case.

13. The admission in a pleading or an affidavit must be clear and unequivocal, indicating that the plaintiff is clearly entitled to the order asked for.

14. We may refer to the judgment of the Apex Court in the case of Jeevan Diesels and Electricals Limited vs. Jasbir Singh Chadha (HUF) and anr. **[(2010) 6 SCC 601]**. Paras 13, 14 and 15 of the said judgment read as under :-

“13. In this connection reference may be made to an old decision of the Court of Appeal between Gilbert v. Smit. Dealing with the principles of Order 40 Rule 11, which was a similar provision in English Law, James, L.J. Held: (Ch D p. 687)

“..... if there was anything clearly admitted upon which something ought to be done, the plaintiff might come to

the court at once to have that thing done, without any further delay or expense.”

14. Mellish, L.J. Expressing the same opinion in Gilbert case made the position further clear by saying:

“it must, however, be such an admission of facts as would shew that the plaintiff is clearly entitled to the order asked for”.

The learned Judge made it further clear by holding: (Gilbert case, Ch D p. 689)

“... The rule was not meant to apply when there is any serious question of law to be argued. But if there is an admission on the pleadings which clearly entitles the plaintiff to an order, then the intention was that he should not have to wait, but might at once obtain any order”

15. In another old decision of the Court of Appeal in Hughes v. London, Edinburgh and Glasgow Assurance co., similar principles were laid down by Lopes, L.J. wherein His Lordship held:

“judgment ought not to be signed upon admissions in a pleading or an affidavit, unless the admissions were clear and unequivocal”.

Both Esher and Fry, L.JJ. Concurred with the opinion of Lopes, L.J.”

15. We may also refer to the judgment of the division Bench of this court in the case of Beryl (Mrs.) Murzello and ors. vs. Ramchandra Bhairo Mane and ors. **[2007 (5) Mh.L.J. 708]**. Para 7 of the said judgment reads as follows :-

“7. The provisions of law comprised under Order XII, Rule 6 of the Code of Civil Procedure are enabling provisions. Undoubtedly, the same confer wide powers on the Court to pronounce judgment on admission at any stage of the proceedings. However, it does not mean that the decree always be granted in terms of prayers in the suit on the basis of admission. The Court has duty to ascertain whether the plaintiff is entitled under the law to get the relief asked for. The Court has to guard itself from allowing the parties to play fraud upon the Court by entering into collusion to defeat not only the provisions of law but even the rights accrued in favour of any other party, whether before the Court or not, but one disclosed from the records before it. The judgment on admission is not a matter of right. It is a matter of discretion of the Court to be exercised judiciously and depending upon the facts and circumstances of the case.”

16. In the facts of the case, the Family Court is entitled and duty bound to ascertain whether the plaintiff is entitled under law to get the relief asked for. For that purposes, the court is entitled to frame appropriate

issues arising out of the pleadings of the parties and/or affidavit of examination-in-chief and, if necessary, ask the parties to lead evidence.

17. In the facts and in view of the reasons stated above, we are of the view that the matter requires to be remanded back to the Family Court. After remand, the Family Court shall deal with the matter in view of the observations made by us as above and in accordance with law.

ORDER

- (i) Appeal is partly allowed.
- (ii) The impugned judgment and decree passed by the Family Court No.7, Bandra, Mumbai, dated 13/3/2015 in Petition No.B-21 of 2014 is quashed and set aside.
- (iii) The matter is remanded back to the Family Court, Bandra, Mumbai. The Family Court shall deal with the petition on its own merits, in accordance with law, and dispose of the same as expeditiously as possible.

(PRAKASH D. NAIK, J.)

(NARESH H. PATIL,J.)