

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11503/2015

Sou. Ashwini Niraj Shiralkar

... Petitioner

V/s.

Niraj Rajkumar Shiralkar

... Respondent

Mr. V. S. Gokhale for the petitioner

Mr. Anand S. Patil for the Respondent.

CORAM: K.K. TATED, J.

DATED : AUGUST 30, 2016

P.C. :

1. Heard the learned counsel for the parties. By this petition under Article 227 of the Constitution of India, the petitioner challenges order dated 29.08.2015 passed by the learned District Judge, Kolhapur in Misc. Civil Appal No.175/2015 confirming the order passed by the 5th Jt. Civil Judge, Senior Division, Kolhapur in application under Order IX Rule 13 read with section 151 of the Code of Civil Procedure, 1908 in Misc. application No.42/2014.

2. In the present proceedings, the petitioner wife filed application on 4.01.2014 for setting aside the *exparte* decree dated 11.09.2012 u/s.9 of the Hindu Marriage Act for restitution of conjugal rights.

3. The learned counsel for the petitioner submits that in the present proceedings, the respondent husband filed HMP No.245/2011

u/s.9 of the Hindu Marriage Act for restitution of conjugal rights. He submits that the trial court passed *exparte* decree on 11.09.2012. On the basis of the said decree the respondent filed divorce petition on 16.11.2015, wherein notices were issued to the petitioner which were received on 06.12.2013. At that time, the wife learnt that the respondent obtained *exparte* decree in HMP No.245/2011. Hence, the petitioner made application under Order IX Rule 13 of the Code of Civil Procedure, 1908 on 4.01.2014. He submits that the trial court as well as the appellate court failed to consider the fact that the respondent husband obtained the *exparte* decree by placing on record incorrect information. He submits that the bailiff report in HMP No.245/2011 clearly shows that the notice was not served because at that time the petitioner was not present in her house. He submits that thereafter the respondent husband obtained order from the trial court for publication under Order V Rule 20 of the Code of Civil Procedure, 1908. He submits that the said publication was not noticed by the petitioner. Hence, when the matter was called out, none appeared on behalf of the petitioner. Hence, *exparte* decree was passed by the trial court on 11.09.2012.

4. The learned counsel for the petitioner submits that the petitioner has good chance of success in the matter. Hence, in the interest of justice, this Hon'ble Court be pleased to set aside the order dated 29.08.2015 passed by the learned District Judge, Kolhapur in Misc. Appeal No.175/2015 and the judgment and order dated 09.06.2015 passed by the Civil Judge, Senior Division, Kolhapur in Misc. Application No.42/2014 and allow the petitioner to contest the HMP

No.245/2011 on its own merits. He submits that if Writ Petition is not allowed, irreparable loss will be caused to the petitioner.

5. On the other hand, the learned respondent vehemently opposed the Writ Petition. He submits that in the present proceedings, though the petitioner had knowledge about the pendency of HMP No.245/2011, she intentionally remained absent. He submits that in the present proceedings, on the basis of bailiff report, the respondent husband made application for substitute service to serve the wife by publication in news paper. In spite of publication in news paper, none appeared on behalf of the wife in HMP No.245/2011.

6. The learned counsel for the respondent submits that thereafter the respondent filed Misc. Civil application No.283/2011 before the District Judge, Kolhapur under Section 8 of the Guardian and Wards Act, 1890 for custody of son on 09.09.2011. He submits that in that petition, the respondent husband specifically made a statement that HMP No.245/2011 was pending before the Civil Judge, Senior Division, Kolhapur. He submits that the said petition was duly served on the petitioner wife. Thereafter the petitioner wife filed reply on 14.01.2012 in MCA No.283/2011.

7. The learned counsel for the respondent submits that the petitioner wife, on behalf of the son filed a maintenance application bearing Criminal Case No.796/2011 in which she specifically stated in para 7 about the pendency of the HMP No.245/2011 filed by the husband u/s.9 of the Hindu Marriage Act for restitution of conjugal

rights. He submits that these facts itself show that the petitioner had knowledge about the pendency of the petition filed by the respondent and in spite of that she remained absent. Hence, the trial court passed *exparte* decree on 11.09.2012. These facts were considered by the appellate court as well trial court at the time of dismissing the petitioner's application for setting aside *exparte* decree. Hence, there is no question of allowing the Writ Petition.

8. Heard both sides. It is to be noted that, in the present proceedings though the petitioner wife had knowledge about the HMP No.245/2011, she remained absent. The documents and records as stated hereinabove clearly show that the wife had knowledge about the petition filed by the husband u/s.9 of the Hindu Marriage Act. These facts were considered by the courts below. Considering these facts and the order passed by both the courts below, I do not find any substance in the Writ Petition.

9. Hence, the Writ Petition stands rejected.

(K.K. TATED, J.)