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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FAMILY COURT APPEAL NO.169 OF 2016
WITH
CIVIL APPLICATION NO.339 OF 2016**

Mr. Kunal Subhash Mahadik ... Appellant

Versus

Mrs. Prachi Kunal Mahadik ... Respondent

Mr. Sanjiv Sawant a/w Mr. Abhishek Deshmukh i/by The Juris Partners
for the Appellant.

Mr. Kunal Mahadik, Appellant in person present.

Mr. Shreyas Sadanand Adyanthaya, for the Respondent.

**CORAM : A.S. OKA &
ANUJA PRABHUDESSAI, JJ.**

DATE : 22nd DECEMBER, 2016

PC.

1 We had put the parties to notice that the Appeal itself will
be taken up for final disposal at this stage. Though the matter was
adjourned on one or two occasions to ascertain whether there is any
possibility of amicable settlement, now we find that no such settlement
is possible.

2 The Appellant and the Respondent are husband and wife. They filed an application on 16th March, 2016 under Section 13-B of the Hindu Marriage Act, 1955 (for short “the said Act”). The prayer in the said Petition was for grant of a decree of divorce by mutual consent. The record and proceeding is called for. We have perused the record. The record shows that the Petition was filed by the parties to the Appeal on 16th March, 2016 which was registered on 22nd March, 2016. The parties were referred to the marriage counsellor and the Petition was fixed on 24th May, 2016. The Roznama records that both the parties were present on that day and the Petition was adjourned for receiving counsellor's report. The next date fixed was 26th September, 2016.

3 It appears from the Roznama that though next date was fixed as 26th September, 2016, on 2nd June, 2016 the Petition was called out when the Respondent – wife was present and the Appellant – husband was absent. On that date, the Respondent filed an application at Exhibit – 6 seeking withdrawal of the consent given by her for passing a decree under Section 13-B of the said Act. Perusal of the record shows that on the said application at Exhibit – 6, an order in writing was passed by the learned Judge on the very day directing that notice of the said application be issued to the present Appellant. Perusal of the record shows that no such notice was issued by the office of the

Family Court to the present Appellant. It appears from the Roznama dated 2nd June, 2016 that the notice was made returnable on 19th July, 2016. On the returnable date i.e. on 19th July, 2016, a report of the marriage counsellor of the same date was submitted before the learned Judge of the Family Court. The learned Judge of the Family Court proceeded to pass the impugned order dated 19th July, 2016. The impugned order reads thus :-

“Petitioner No.1 absent. Petitioner No.2 present. The Ld. Advocate for petitioners present. Report of marriage counsellor received. Petitioner No.2 has withdrawn her consent. On verifying it, petitioner No.1 has told the Court that he had not paid her required compensatory and not returned her streedhan. Petition is disposed of as per Exh.6.”

4 The submission of the learned counsel appearing for the Appellant is that though the Petition was fixed on 26th September, 2016, without notice to the Appellant, the same was taken on board on 2nd June, 2016. He submitted that notice of the application at Exhibit -6 made by the Respondent – wife was never served to the Appellant and therefore, the Appellant was not aware that the next date was 19th July, 2016. He submitted that though the Appellant was absent on 19th July, 2016, both the report of the counsellor of the same date and the impugned order proceed on the footing as if the Appellant was present.

He, therefore, submitted that a complete illegality has been committed by the learned Judge.

5 The learned counsel appearing for the Respondent submitted that during the statutory period provided under Section 13-B, the Respondent was entitled to withdraw her consent. By relying upon various decisions of the Apex Court, he submitted that a decree under Section 13-B can be passed provided the consent of both the parties to the marriage continues up to the date of passing of the decree. He submitted that the reference to statement of the Appellant in the impugned order is by mistake and in fact, the statement recorded therein is of the Respondent – wife.

6 We have given careful consideration to the submissions. As stated earlier, the perusal of the record shows that though on 24th May, 2016 the Petition was fixed on 26th September, 2016, on 2nd June, 2016 the Petition was taken on board without notice to the Appellant. Application at Exhibit – 6 was filed by the Respondent on that day praying for grant of permission for withdrawal of her consent. Notwithstanding the specific order passed by the learned Judge of the Family Court on the said application to issue notice of the said application to the Appellant, in fact no such notice was issued.

Therefore, the Appellant was not aware of the fact that next date fixed was 19th July, 2016.

7 As far as the law on the withdrawal of consent by one of the two spouses is concerned, it is well settled right from the decision of the Apex Court in the case of *Smt.Sureshta Devi V. Om Prakash*¹. In the case of *Smruti Pahariya vs Sanjay Pahariya*², the Apex Court held that it is only on the continuing mutual consent of the parties that a decree of divorce under Section 13-B of the said Act can be passed by the Court. The Apex Court has observed that if the Petition for divorce is not withdrawn on the date fixed for passing the decree, it is a statutory obligation of the Court to hear the parties with a view to ascertain their consent. Coming back to the impugned order, we agree with the submission made by the learned counsel appearing for the Respondent that the reference to the statement of the Appellant in the said order is by mistake. In fact, it is apparent that it was the Respondent – wife who made a statement before the Court that the Appellant had not paid required amount and has not returned sreedhan. Thus, the impugned order shows that the grievance of the Respondent – wife was that she was not willing to continue her consent as necessary amount was not paid by the Appellant and sreedhan was not returned by the Appellant.

1 (1991) 2 SCC 25

2 (2009) 13 SCC 33

The Appellant was not granted any opportunity to deal with this grievance.

8 As per the earlier order dated 2nd June, 2016, the Appellant was required to be heard on the basis of application at Exhibit – 6 as notice of the said application was ordered to be issued to the said Appellant. However, no such notice was issued. As pointed out earlier, the Apex Court has observed that on the date fixed for hearing of a Petition under Section 13-B, the Court is under an obligation to hear both the parties.

9 The date earlier fixed on 26th September, 2016 was preponed without notice to the Appellant. The Appellant was not provided with a copy of the application at Exhibit – 6 and the Appellant was not given a notice that the Petition will be heard on 19th July, 2016.

10 Therefore, we have no option but to set aside the impugned order dated 19th July, 2016. We may note here that the observation made by the learned counsellor in his report dated 19th July, 2016 that he had interviewed both the parties on that date appears to be incorrect as admittedly the Appellant was not present on that day.

11 Hence, we dispose of the Appeal by passing the following order :-

ORDER

- (i) The impugned order dated 19th July, 2016 is hereby quashed and set aside. The Petition PF No.195 of 2016 is restored to the file of the Family Court No.2 at Pune;
- (ii) We direct the parties to appear before the learned Judge of the Family Court No.2, Pune on Monday i.e. 30th January, 2017 at 11.00 am;
- (iii) It will be open for the Appellant to file a reply to the Application at Exhibit – 6 on the date fixed for appearance. No further time shall be granted to the Appellant;
- (iv) The learned Judge of the Family Court shall pass appropriate order on the Petition in accordance with law. The order shall be passed as expeditiously as possible;
- (v) We have made no adjudication on the merits of the controversy;
- (vi) The Appeal is partly allowed on above terms with no order as to costs. Registry to transmit the record and proceeding along with writ of this Judgment and Order to the concerned Family Court. Civil Application No.339 of 2016 does not survive and the same is disposed of.

(ANUJA PRABHUDESSAI, J)

(A.S. OKA, J)