

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
FAMILY COURT APPEAL NO. 104 OF 2017

Mrs. Manisha Ashok Sutaria @ ManishaAppellant
Dipakkumar Desai
R/o Anand Nagar, Opp. Nilkanth Cinema,
Block 13, L-148 Arihant, Rajkot, Gujrat.

V/s.

Mr. Ashok SutariaRespondent
R/o. Bhagweshwar Shikar-1 Flat No. 4,
60 Ft. Road, Ghatkopar (East) Mumbai-400 077.

Mr. Saeed Kadu advocate for the appellant.
Ms. Anushka Shreshtha for the respondent.

**CORAM : SMT. VASANTI. A. NAIK,
SARANG V. KOTWAL, JJ.
DATE : DECEMBER 11, 2017.**

ORAL JUDGMENT:

The family court appeal is Admitted and heard finally at the stage of admission as the parties were put to notice by the order dated 20/07/2017 that the family court appeal would be heard at the admission stage.

By this family court appeal, the appellant-wife has challenged the order of the Family Court Mumbai, at Bandra dated 23/01/2017 in Civil M. A. No. 246 of 2014 rejecting the application filed by the appellant under Order 9 Rule 13 of Civil Procedure Code for setting aside the ex-parte judgment and decree passed in favour of the respondent-wife in the petition filed by him for

a decree of divorce on the ground of cruelty.

The respondent-husband and the appellant-wife were married as per the customs prevailing in their community on 26/06/2012 at Gujrat. Since there were some disputes between the parties, the parties had started residing separately. The husband filed a petition against the wife bearing petition A-715 of 2013 for a decree of divorce on the ground of cruelty. The said petition was allowed by an ex-parte judgment and decree dated 10/10/2014. After the appellant-wife became aware of the ex-parte judgment and decree dated 10/10/2014, she had moved an application for setting aside of the ex-parte decree, under Order 9 Rule 13 of the Civil Procedure Code. The application of the appellant-wife was rejected by the judgment dated 23/01/2017. The judgment is challenged by the appellant by filing this family court appeal.

The learned counsel for the appellant-wife submitted that the Family Court was not justified in dismissing the application filed by the appellant for setting aside of ex-parte decree. It is submitted that the Family Court failed to give due weightage to the fact that the appellant-wife was residing at Rajkot and it was not possible for her to attend the Family Court at Bandra on each and every date of hearing. It is submitted by taking this Court through the relevant portion of the judgment of the Family Court that on several dates of hearing, the wife had remained present before the Family Court. It is stated that though the wife had explained the reasons for remaining absent before the Family Court when the matter was decided ex-parte and had pointed out

that there was 'sufficient cause' for the appellant not to remain present before the Family Court at the relevant time, the Family Court did not consider the reasons stated by the appellant in the right perspective. It is submitted that some proceedings are filed by the wife at Rajkot and in the circumstances of the case, when the appellant is unemployed and has a minor daughter from her earlier marriage, it was not possible for her to attend the Family Court at Bandra on every date of hearing. It is submitted that by taking a lenient view in the matter as the petitioner is residing at Rajkot along with her minor daughter and was at the relevant time residing with her old and ailing parents, this Court may set aside the judgment of the Family Court dated 23/01/2017 and remand the matter to the Family Court for a fresh decision in the matter on merits.

On the other hand, it is submitted on behalf of the respondent-husband that the appellant was grossly negligent in defending the petition filed by the husband and in the circumstances of the case, the Family Court had rightly rejected the application filed by the appellant for setting aside the ex-parte decree. It is submitted that on several dates of hearing, the wife had failed to remain present before the Family Court. It is stated that though the wife had sought for legal aid and the same was provided to her, she failed to remain present. It is stated that in the circumstances of the case, the Family Court had no other alternative to decide the petition filed by the husband, ex-parte, in the absence of the wife. It is submitted that the appellant had failed to enter into witness box in this proceedings and had filed a pursis that she did not wish to

tender evidence to prove sufficient cause. It is submitted that solely on the basis of the medical reports and other medical papers tendered by the appellant before the Family Court relating to her old father and mother, the Family Court could not have set aside the ex-parte judgment and decree dated 10/10/2014. The learned counsel sought for the dismissal of the family court appeal.

On hearing the learned counsel for the parties and on a perusal of the record and proceedings and the judgment of the Family Court, it appears that the following points arise for determination in this family court appeal:-

(i) Whether the family court was justified in rejecting the application filed by the wife for setting aside the ex-parte judgment and decree?

(ii) What order?

To answer the points for determination in this family court appeal, it would not be necessary to refer to the factual disputes between the parties. It is only necessary to consider the dates on which the Family Court had fixed the petition filed by the husband for hearing and what transpired on those dates. It appears that the appellant had voluntarily appeared before the family court on 13/08/2013 and had filed a pursis in respect of her appearance vide exhibit 11. On the next date of hearing i.e. 03/09/21013, the wife failed to

appear and the Family Court passed an order of “No W.S.”. The wife remained absent on 22/10/2013 but remained present on the next date of hearing on 09/12/2013. The respondent-husband had filed his affidavit in examination-in-chief on 24/01/2014 and the matter was adjourned for his cross-examination on 20/02/2014. Since the appellant was absent on that day, the Court had issued notice for securing her appearance. The wife appeared on the next date of hearing i.e. 25/03/2014 and sought for legal aid. The legal aid was granted to the wife. However, the wife did not remain present on 28/04/2014 and after the notice was served on her, she appeared in the Family Court on 22/05/2014. She also remained present on the next date of hearing i.e. 08/07/2014. Thereafter, since the wife failed to remain present, the ex-parte judgment and decree was passed on 10/10/2014.

In the circumstances of the case, we do not find that the wife was totally negligent in defending the action against her. Though the wife was not present on some of the dates of hearing, she was present on the other dates of hearing. The Family Court ought to have considered that the wife was not a resident of Mumbai and was residing at Rajkot, whereas the husband was residing at Mumbai. The wife has filed certain proceedings against the husband at Rajkot, however, the husband had filed proceedings against the wife for the decree of divorce at Mumbai. Admittedly, the wife has a minor daughter from her first marriage and when the wife had to look after the minor daughter, it must not have been easy for the wife to leave the minor daughter at Rajkot and attend the proceedings in the Family Court at Bandra on each and every date of hearing. It is the case of the wife that a lawyer

practicing in the Supreme Court had asked the appellant-wife not to attend the Family Court proceedings at Mumbai. Though minute and specific details in that regard are not stated in the application for setting aside the ex-parte decree, we cannot disbelieve the said statement in the totality. We find that numerous documents were tendered by the wife before the Family Court to show that her mother and father were seriously ill in the year 2014. The Family Court has made a mention about the same in the judgment that is appealed in this family court appeal. If that be so, the Family Court ought to have taken a lenient view in the matter of the wife and should have granted her a last chance to defend the petition filed by the husband. In the circumstances of the case, specially because the wife was residing at Rajkot and it was difficult for her to attend the Family Court at Bandra on each and every date of hearing, it would be necessary to set aside the judgment of the Family Court dated 23/01/2017 and remand the matter to the Family Court so as to give an opportunity to the wife to defend the petition. It is needless to mention that if on this occasion the wife fails to defend the petition and continues to remain absent before the Family Court without any just or reasonable cause, the Family Court would be free to decide the matter in accordance with law.

Hence, for the reasons aforesaid, the family court appeal is partly allowed. The judgment of the Family Court dated 23/01/2017 rejecting the application of the appellant-wife for setting aside the ex-parte judgment and decree is hereby set aside. The judgment of the Family Court dated

10/10/2014 is also set aside. The matter is remanded to the Family Court for deciding the petition filed by the husband as early as possible, in accordance with law. The parties undertake to appear before the Family Court at Bandra on 08/01/2018 so that issuance of notice to the parties could be dispensed with. Since the husband had filed the petition in the Family Court in the year 2013 and the petition is old, the Family Court is requested to make an endeavour to decide the matter at the earliest. In the circumstances of the case, no order as to costs.

[SARANG V. KOTWAL, J.]

[SMT. VASANTI A. NAIK, J.]