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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL No. 91 OF 2016

Arman Noshir Irani	...	Appellant
Vs.		
Nargis Arman Irani	...	Respondent

Mrs. Armaity Khushrushahi a/w Ms. N. Almeida, for the Appellant.
Mr. Shyam Mehta, Sr. Counsel / amicus curiae, a/w Mr Bhavik
Manek, for the Respondent.

CORAM : V. M. KANADE, &
A. S. GADKARI, JJ.

DATE : MARCH 15, 2017

PC.

1. Heard the learned counsel appearing on behalf of the Appellant and the learned amicus curiae and senior counsel Mr. Shyam Mehta, who appeared on behalf of the Respondent. The Appellant is aggrieved by an order dated 18th February, 2016 passed by the Family Court at Bandra, Mumbai. By the said order, the learned Family Court accepted the application filed by the Respondent-wife for withdrawal of the consent which was given by her at the time of filing the petition for divorce by mutual consent.

2. Brief facts, which are relevant for the purpose of deciding the appeal are that the Appellant and the Respondent got married under the Special Marriage Act, 1954 on 12th May, 2008. Serious differences arose between them in May, 2012. Thereafter the parties started living separately. From 15th February, 2014 the Appellant started residing at his mother's house in Chikilwadi. Thereafter in April, 2015 both the parties decided to file a petition for divorce by mutual consent and accordingly, an agreement was arrived at between the parties in respect of permanent alimony, which was to be paid to the Respondent-wife and consent terms were drafted. In the said consent terms, the Appellant has agreed to pay Rs. 40 lakhs in 12 monthly installments of Rs. 1,50,000/- to the Respondent wife from April, 2015.

3. On 17th June, 2015 a petition for divorce by mutual consent was filed by the parties in the Family Court at Bandra. On 25th June, 2015 the said petition was registered in the Family Court. The parties appeared before the Judge and the counselor had verified their consent.

4. The petition was posted for final hearing before the

Family Court on 22nd December, 2015, on which date the Respondent – wife informed the Court that she wanted sometime to reconsider the said decision. By that time, the Appellant had paid a sum of Rs.14,88,000/- plus \$ 200 (equal to Rs. 12,000/- at the then rate of exchange) plus the respondent has kept the deposit of Rs. 1 lakh from the flat, and according to the Appellant, an amount of Rs. 16 lakhs was paid to the Respondent.

5. On 18th February, 2016 when the matter came up for final hearing, the Respondent – wife informed the Court that she wanted to withdraw her consent, by filing an application. In the said application she did not state the reason why she wanted to withdraw the consent, nor did she mention that her consent was obtained by fraud, force or coercion. In the said application she had expressed her willingness to return the amount, which was paid to her by the husband.

6. The learned Judge of the Family Court accepted the said application and dismissed the petition by the impugned order. The learned counsel appearing on behalf of the Appellant submitted that once the Respondent having acted on the said consent terms and having received an amount of Rs. 16 lakhs, she may not be

permitted to withdraw her consent. Reliance was placed on number of judgments of the Apex Court and this Court by her. She has invited our attention to the following judgments :

- (i) Apex court judgment in the case of *Anil Kumar Jain Vs. Maya Jain*¹;
- (ii) Judgment of the learned Single Judge of this Court in the case of *Rajesh Sainani Vs. Bhavna Sainani*²
- (iii) Judgment of the Division Bench of this Court in the case of *Prakash Alumal Kalandari Vs. Mrs. Jahnvi Prakash Kalandari*³ ; and
- (iv) the judgment of the learned Single Judge of this Court in the case of *Mahernosh Jamshed Homavazir and. Shirin Mehernosh Homavazir*⁴

She submitted that it was not open for the Respondent to withdraw her consent.

7. Since the Respondent-wife is appearing in person, we requested Mr. Shyam Mehta, the learned senior counsel to assist the Court in this case, as it involves a question of law, which is required to be decided by this Court. He invited our attention to the judgment of

1 2009 (10) SCC 415

2 2008 (6) Mah. L.J. 853

3 2011 (3) AIR (Bom.) R 771

4 Parsi Suit No. 17 of 2015, dated 30th August, 2016.

the Apex Court in the case of *Hitesh Bhatnagar, Appellant Vs. Deepa Bhatnagar, Respondent*¹. He submitted that the Supreme Court after having considered all earlier judgments had held that it was open for any one of the parties to withdraw the consent before the final order is passed in the petition for divorce by mutual consent. He also submitted that when the marriage has been irretrievably broken down, it is not open for the High Court to pass an order on that ground, since the High Courts do not have residuary power, as is vested under Article 142 of the Constitution of India in the Supreme Court. He submitted that by the judgment in the case of *Sureshta Devi Vs. Om Prakash*² though the High Court has granted divorce on the ground of mutual consent under Section 13B of the Hindu Marriage Act, 1955, the Apex Court has set aside the said order. Therefore, taking into consideration the catena of judgments of the Apex Court, we are of the view that it was open for one of the parties to withdraw the consent before petition for divorce by mutual consent was finally decided.

8. He submitted that so far as maintenance amount which is already paid is concerned, it is out of her individual agreement.

1 (2011) 5 SCC 234

2 (1991) 2 SCC 25.

9. After having gone through all the judgments of the Apex Court and this Court, we are of the view that the judgments on which reliance is placed by the learned counsel for the Appellant are no longer *res integra*. We are bound by the observations made in the judgments of the Apex Court in the cases of *Hitesh Bhatnagar* and *Sureshta Devi (both supra)*. In the present case, the Respondent has not even come before the Court and shown willingness to go back to the husband though the husband is not willing to take her back. It is an admitted position that marriage of the parties is not consummated on account of some problem faced by the Respondent and this problem is not likely to be solved in the near future.

10. It is also true that the Respondent has not given any reason whatsoever for rescinding from the consent which she had originally given. Secondly, the Respondent has accepted the substantial amount of maintenance, which was paid by husband every month.

11. Mr. Shyam Mehta, learned senior counsel appearing for the Respondent as an amicus curiae invited our attention to the observations made by the Apex Court in the case of *Anil Kumar Jain*

(*supra*). He submitted that the Apex Court has in terms held that the power which is vested in the Supreme Court under Article 142 of the Constitution of India does not vest in the High Courts or the Civil Courts. The Apex Court in para 29 of the said judgment has observed as under:

“29. In the ultimate analysis the aforesaid discussion throws up two propositions. The first proposition is that although irretrievable break-down of marriage is not one of the grounds indicated whether under Sections 13 or 13B of the Hindu Marriage Act, 1955, for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13B of the aforesaid Act. This doctrine of irretrievable break-down of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds not provided for in Section 13

and 13B of the Hindu Marriage Act, 1955.”

12. Though we are completely satisfied that the marriage between the parties is irretrievably broken down, we are unable to help the Appellant in this case. The only ray of hope for him is to approach the Apex Court and seek the decree of divorce on that ground.

13. So far as amount of alimony which is paid so far by the Appellant is concerned, at this stage, we do not propose to pass any order and we keep the said issue open, and we direct the Family Court to decide the said issue. We direct the Family Court to decide the petition, being Family Court Petition No. F-1379 of 2016 expeditiously. We, however, direct the Family Court that if an application is filed by the party for converting the petition for divorce by mutual consent into a petition for divorce or if any other application is made for annulment of marriage, the same may be decided in either way by the Family Court expeditiously, in any case within six months. The Appellant, however, shall not pay any installments hereinafter. Appeal is accordingly disposed of in the aforesaid terms. Under the circumstances, there shall be no order as to costs.

14. We must express our sincere appreciation to the assistance given by Mr. Shyam Mehta, learned senior counsel, who was pleased to accept the suggestion made by us to appear as an amicus curiae on behalf of the Respondent.

Sd/-

[A. S. GADKARI, J.]

Sd/-

[V. M. KANADE, J.]

Vinayak Halemath