

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FAMILY COURT APPEAL NO.171 OF 2008

Mrs. Anita Sanjay Shetty. .. Appellant
Vs
Mr.Sanjay Shetty .. Respondent
—
Ms Tabassum Shaikh i/b Shri P.M. Havnur for the Appellant.
Shri V.S. Kapse for the Respondent.
—

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

DATED : 8TH FEBRUARY 2017

ORAL JUDGMENT (PER A.S. OKA, J)

1. The Respondent husband filed a Petition in the Family Court at Bandra, Mumbai for seeking a decree of divorce on the ground of cruelty. The said Petition was decreed on 26th June 2006 by the the learned Judge of the Family Court by which the marriage solemnized between the Appellant and the Respondent was dissolved on the ground of cruelty. The learned Judge of the Family Court noted that though the Appellant was served with the notice of the Petition, she remained absent. The learned Judge further noted that an order was passed earlier to proceed with the Petition ex parte. An Application for setting aside the ex parte decree was made by the Appellant by invoking Rule

13 of Order IX of the Code of Civil Procedure, 1908. The said Application was filed essentially on the ground that the Appellant was not served with the notice of the Petition filed by the Respondent. By the Judgment and Order dated 28th April 2008, the said Application was rejected.

2. By this Family Court Appeal, an exception is taken both to the decree of divorce dated 26th June 2006 as well as the order dated 28th April 2008. We have heard the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondent.

3. We have perused the impugned judgment by which the decree of divorce was passed. In Paragraph 7 of the impugned judgment, the learned Judge of the Family Court has noted that though the Appellant was served with the notice, she remained absent and, therefore, an order was passed to proceed ex parte. The Respondent filed his affidavit-in-lieu of examination-in-chief at Exhibit-5. Paragraph 8 of the impugned judgment is the only paragraph which deals with the prayer for divorce. Paragraph 8 of the impugned judgment reads thus:

“8. The Petitioner has filed her affidavit in lieu of evidence at Exh.5 and reiterated whatever stated by him in his petition. The Respondent has not appeared in the court and failed to file her written statement to challenge the Petitioner's claim. Thus, the Petitioner's contentions have gone unchallenged and uncontroverted. It is clear from the contentions of the Petitioner that he cannot reasonably be expected to

live with the Respondent. Hence, he is entitled to decree of divorce. I have therefore, answered the Point Nos.1 and 2 in the affirmative”.

4. It will be necessary to make a reference to Clauses (a) and (b) of Sub-section (1) of Section 23 of the Hindu Marriage Act, 1955 (for short “the said Act”). Clauses (a) and (b) of the said Act read thus:

“(1) In any proceedings under this Act, whether defended or not, if the Court is satisfied that:-

(a) any of the grounds for granting relief exists and the petitioner ⁴⁷ [except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5] is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified ⁴⁸ [***] in clause (i) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(bb)
 (c)
 (d)
 (e)”

5. In the present case, the decree has been passed by the learned Judge of the Family Court only on the ground that the assertions made by the Respondent in his Petition have gone unchallenged and uncontroverted. There is no finding recorded by the learned Judge of the Family Court on the question whether the

Respondent had proved his allegation of cruelty. Under Clause (a) of Sub-section (1) of Section 23 of the said Act, the Court is under an obligation while dealing with the Petition for divorce, to decide whether the Petitioner is defended or not, any of the grounds pleaded for granting relief of decree of divorce exist and that the Petitioner is not taking advantage of his or her own wrong or disability for the purpose of relief. Secondly, the Court has to be satisfied that the Petitioner has not in any manner connived at or condoned the act of cruelty.

6. Therefore, whether a Petition for divorce is defended or not, the Court has to be satisfied that the ground pleaded by the Petitioner exists. Such satisfaction can be recorded only after consideration of the evidence on record and only after a proper finding is recorded regarding the proof of existence of the ground for grant of divorce.

7. In the present case, the ground pleaded is of cruelty. Therefore, the learned Judge of the Family Court was required to consider the evidence and material on record and to record a finding with reasons as to whether the allegations of cruelty were proved by the Respondent. After recording such finding, he was required to apply his mind as to whether the Respondent has taken advantage of his own wrong and whether he has condoned the act of cruelty.

8. As stated earlier, as contemplated by Clauses (a) and (b) of Sub-section (1) of Section 23 of the said Act, the satisfaction must be recorded. In the present case, no such satisfaction has been recorded by the learned Judge of the Family Court. Moreover, Paragraph 8 of the impugned judgment shows that the learned Judge has not applied her mind to the affidavit-in-lieu of examination-in-chief of the Respondent. In our view, the learned Judge committed a gross error by passing a decree of divorce only on the ground that the contentions raised by the Respondent in the pleadings have gone unchallenged and uncontroverted.

9. The Paragraph 9 of the impugned judgment shows that there was also a prayer made by the Respondent for grant of custody of minor child. The age of minor child is more than 16 years as the child is born on 29th September 1990. The learned Judge of the Family Court has not disturbed the custody of the Appellant mother. There is no reason to disturb this part of the decree.

10. Though by setting aside the impugned decree of divorce, the Petition will have to be remanded to the Family Court as the decree is not challenged by the Respondent, we are not disturbing that part of the decree which deals with the prayer for custody.

11. We may note here that the Respondent has filed written submissions. The written submissions are only on the rejection of the prayer for setting aside the decree made in the Application under Order IX Rule 13 of the said Code.

12. Hence, we pass the following order:

ORDER :

- (a) The impugned Judgment and Decree dated 26th June 2006 passed by the learned Judge of the Family Court in Petition No.A-1671 of 2005 is quashed and set aside only to the extent to which the decree of divorce was passed by the learned Judge of the Family Court. That part of the decree which rejects the prayer of the Respondent for grant of custody of minor child is not disturbed and the same is hereby confirmed;
- (b) We direct the Appellant and the Respondent to appear before the learned Principal Judge of the Family Court at Bandra, Mumbai, on 27th March 2017 at 11.00 a.m. The Registry shall immediately transmit the record of the Family Court to the

concerned Family Court along with a writ of this order;

- (c) It will be open for the Appellant to file her written statement on 27th March 2017. No further time shall be granted by the Family Court for filing written statement;
- (d) If written statement is filed by the Appellant within the stipulated time, needless to add that the Respondent will be entitled to file a supplementary affidavit-in-lieu of examination-in-chief and examine other witnesses;
- (e) The learned Judge of the Family Court shall proceed to decide the Petition No.A-1671 of 2005 expeditiously in accordance with law;
- (f) All contentions on merits are kept open;
- (g) The Appeal is partly allowed on above terms.