

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.10100 OF 2016

Mrs. Anjali Satish Chavan

..Petitioner

Versus

Mr. Satish Shashikant Chavan

..Respondent

Mr. Rajiv Deokar for the Petitioner.

Mr. T. S. Mahamuni i/by Mr. S. G. Mahamuni for the Respondent.

CORAM : R. M. SAVANT, J.

DATE : 17th JANUARY, 2017

PC.

1 The writ jurisdiction of this Court is invoked against the order dated 25.04.2016 passed by the Learned Principal Judge, Family Court, Mumbai. By which order, the application Exh.9 filed by the Petitioner herein under Order IX Rule 9 of the Civil Procedure Code (For short “the CPC”) came to be rejected.

2 The marriage between the Petitioner and the Respondent took place on 06.05.2011 and on account of the estrangement between them, they are living separately since 13.11.2011. The Respondent herein had filed Marriage Petition being No.A-2987 of 2011 under Section 12(1) (a) of the Hindu Marriage Act, 1955. The relief sought in the said Marriage Petition was a declaration that the marriage solemnized between the Petitioner and the Respondent be declared as null and void.

Hence a decree of nullity was sought in the said Petition on the grounds mentioned therein. The sum and substance of the grounds is that the marriage was not consummated between the parties.

3 The Respondent had filed an application for withdrawal of the said Marriage Petition No.A-2987 of 2011. The said application was rejected by the Learned Judge of the Family Court No.6, Mumbai, by order dated 28.04.2014 with cost of Rs.1000/- imposed on the Respondent. The said Marriage Petition thereafter came to be dismissed for non-prosecution on 08.12.2014 as no appearance was put up on behalf of the Respondent, so as to adduce evidence, in spite of the ample time and opportunity granted to him. The Respondent had prior thereto filed a second Petition being No.2192 of 2014 on 20.08.2014. The said Petition was filed under Section 13(1)(i-a) of the Hindu Marriage Act, 1955, seeking dissolution of the marriage on the grounds mentioned in the said Petition. It seems that on 30.10.2014 the Respondent filed an application for withdrawal of the said Petition on the ground that certain facts remained to be mentioned in the said Marriage Petition. It seems that the Petitioner herein i.e. the wife was not served with the second Petition i.e. Marriage Petition No.A-2192 of 2014. The said application filed by he Respondent came to be allowed and the Petition was allowed to be withdrawn with liberty to file a fresh Petition by order dated

30.10.2014. It is thereafter that the present Petition being No.A-685 of 2015 has been filed under the same provision i.e. under Section 13(1)(i-a) of the Hindu Marriage Act for dissolution of the marriage.

4 After the instant Petition was served on the Petitioner herein, she has filed the instant application Exh.9 questioning the maintainability of the Petition by invoking Order IX Rule 9 of the CPC. It seems that the Respondent wife has filed her written statement prior to the application Exh.9 and the Respondent also filed his affidavit of evidence after passing of the impugned order. The application Exh.9 was considered by the Learned Principal Judge of the Family Court, Mumbai. The Learned Principal Judge has adverted to Order IX Rule 8 as also Order IX Rule 9 of the CPC. The Learned Principal Judge observed that an application under Order IX Rule 9 of the CPC could be filed only if the earlier proceedings was dismissed and not if it was allowed to be withdrawn. The Learned Principal Judge adverted to the fact that the earlier Petition i.e. A-2987 of 2011 was filed for declaration of the marriage as null and void, whereas the present Petition is filed for divorce on the ground of cruelty and therefore the Learned Judge was of the view that the causes of action for both the Petitions were different. Hence the Learned Principal Judge observed that Order IX Rule 9 of the CPC would have no application in so far as the earlier Petition i.e. A-2192 of 2014 is concerned. The Learned

Judge accordingly rejected the application Exh.9.

5 The Learned Counsel appearing on behalf of the Petitioner Mr. Rajiv Deokar would contend that the application Exh.9 was in reference to the first Petition filed by the Respondent herein i.e. A-2987 of 2011 which has been dismissed for default and not the earlier Petition No.A-2192 of 2014. The Learned Counsel would contend that the cause of action is the same for both the Petitions, namely which has arisen in the year 2011 when the Petitioner was driven out of the matrimonial house. The Learned Counsel would therefore contend that the present Petition is barred on the application of Order IX Rule 9 of the CPC and relies upon the judgment of the Privy Council reported in *AIR (36) 1949 Privy Council 78* in the matter of *Mohammad Khalil Khan and others Vs. Mahbub Ali Mian and others*, the judgment of a Learned Single Judge of the Delhi High Court reported in *AIR 2006 Delhi 271* in the matter of *Smt. Malti Vs. Ramesh Kumar* and the judgment of a Division Bench of this Court reported in *1994 Mh.L.J. 812* in the matter of *Canning Mitra Phoenix Ltd. Vs. M/s. Popular Constructions and another.*

6 In my view, the said judgments would not in any way further the case of the Petitioner in so far as the applicability of Order IX rule 9 of

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the CPC is concerned. In the instant case, as indicated above, the first Petition No.A-2987 of 2011 was filed under Section 12(1)(a) of the Hindu Marriage Act seeking declaration that the marriage is null and void, whereas in the instant Marriage Petition decree of divorce is sought on the ground of cruelty, the cause of action can be said to be different as also continues so as to entitle the Respondent herein to file the second Petition for dissolution of marriage on the ground of cruelty. Hence the facts of the instant case are such that the judgments cited (*supra*) would have no application. In that view of the matter, no case for interference in the writ jurisdiction of this Court is made out. The Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]