

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL (L) NO.31485 OF 2017

ALONG WITH

CIVIL APPLICATION NO.292 OF 2017

Jayesh Trilokumar Shah.] ... Appellant

Versus

Julie Jayesh Shah.] ... Respondent

Ms. Taubon F. Irani for Appellant.

Mr. R. T. Lalwani a/w Mr. Prakash Mahadik for Respondent.

**CORAM :- SMT. VASANTI A. NAIK &
SARANG V. KOTWAL, JJ.**

DATE :- 14 DECEMBER, 2017

P. C. :-

By this Family Court Appeal, the appellant – husband has challenged the judgment of the Judge, Family Court No.2, Bandra, Mumbai, dated 18/08/2017 allowing an application filed by the respondent – wife for restoration of Petition No.A-2585/2012 filed by her for a decree of divorce subject to payment of costs of Rs.25,000/- to the District Legal Services Authority Suburb Mumbai, within 15 days.

The marriage between the appellant – husband and the respondent – wife was solemnized according to the customs prevailing in their community. Petition No.A-2585 of 2012 was filed by the respondent –

wife for a decree of divorce. The appellant – husband had filed a petition for the custody of the minor child who is now more than 17 years of age. Both these proceedings were heard together by the Family Court. On 26/09/2014 since the respondent and her Counsel were absent, the Family Court struck off the defence of the wife in the proceedings filed by the husband for custody of the child and dismissed the petition filed by her for a decree of divorce. An application was filed by the wife for setting aside the order of striking off the defence. The said application was allowed though the parties did not tender any evidence in the same. The said order is not challenged by the husband. By the judgment dated 18/08/2017, the Family Court allowed the application filed by the wife for setting aside the order of dismissal of her petition subject to payment of costs of Rs.25,000/- after considering the evidence led by the wife in respect of the prayer made in the Miscellaneous Civil Application as the husband had not led any evidence in rebuttal. The judgment of the Family Court dated 18/08/2017 allowing the application of the wife for setting aside the order dismissing the petition in default is challenged by the husband in this appeal.

Ms. Irani, learned Counsel for the appellant – husband submitted that the Family Court had rightly dismissed the petition filed by the wife by the order dated 26/09/2014 after observing that the wife and her advocate were absent despite repeated calls. It is submitted that the Family Court had observed in the order of dismissal of the petition for want of prosecution that the wife had committed repeated defaults and the said fact was experienced by the learned Judge. It is stated that it is clearly observed by the Family Court in the order dismissing the petition in default that the wife had not permitted the husband to avail the access of the child. It is stated that though the wife was directed to deposit exemplary costs of

Rs.5,000/- with the Children's Complex of the Family Court, the order was not complied with and in such circumstances, the Family Court has rightly dismissed the petition of the wife by the order dated 26/09/2014. It is submitted that the Court has observed in the order of dismissal that in view of the absence of the wife and her Counsel, the petition could not be proceeded with. It is submitted that since the wife was negligent in prosecuting her petition and was delaying the matter filed by her husband for custody, the order of dismissal of the petition could not have been set aside.

On the other hand, it is submitted on behalf of the wife that on 26/09/2014, the Counsel for the husband had personally met the Counsel for the wife and informed the Counsel that she would not be available on 26/09/2014 and her junior would be filing an application for adjournment. It is submitted that despite the said assurance, the junior advocate appeared on behalf of the husband and did not inform the Court about the communication between her senior and the Counsel for the wife. It is submitted that under a *bona fide* belief that the Counsel for the husband would move an application for adjournment, the Counsel for the wife did not remain present in the Family Court on 26/09/2014. It is submitted that in the present proceeding, an application was filed by the husband for dismissal of the Miscellaneous Application on the ground that the wife had disobeyed the orders passed by the Family Court. It is submitted that the said application was dismissed and the writ petition filed by the husband against the orders dismissing the said application was also dismissed. It is stated that the findings in the application filed by the husband have attained finality. It is submitted that the petition filed by the wife was dismissed without giving an opportunity to her to show cause as to why she

had not deposited the costs of Rs.5,000/- in the Court, which she had explained subsequently in her affidavit of examination-in-chief. It is stated that the Family Court has taken a just view of the matter in allowing the application filed by the wife for restoration of her petition for divorce and in the circumstances of the case, this Court may not interfere with the same.

On hearing the learned Counsel for the parties and on a perusal of the documents as also the judgment appealed against, it appears that the following points arise for determination in this Family Court Appeal :

1. Whether the Family Court was justified in restoring the petition filed by the wife for a decree of divorce ?
2. What order ?

We find on a perusal of the order dismissing the petition of the wife in default that the petition was dismissed on two grounds. Firstly, according to the Family Court, the wife had committed repeated defaults and on 26/09/2014 she and her Counsel remained absent despite repeated calls. The application was dismissed also because the wife had not deposited the costs of Rs.5,000/- with the Children's Complex though an order in that regard was passed on 02/09/2014. The Family Court rightly considered the evidence tendered by the wife and the material available on record to hold that the wife and her Counsel could not have been blamed for remaining absent in the Family Court on 26/09/2014. The matter was fixed on 26/09/2014 for hearing the application filed by the husband. In the absence of the senior advocate of the husband, who was not available at that time, the application could not have been heard. Moreover, it was borne from the material on record that the Counsel for the husband had

informed the Counsel for the wife that she would not be attending the Court on 26/09/2014 because of some personal reason and her junior would seek an adjournment. Despite the said assurance, the junior of the Counsel for the husband did not inform about the aforesaid communication between the Counsel for the husband and the Counsel for the wife, with the result, that the Family Court carried an impression that the wife and her Counsel were negligent in attending the matter despite repeated calls. It is observed by the Family Court in the impugned order and rightly so that some opportunity ought to have been granted to the wife to explain as to why she has not deposited the costs of Rs.5,000/- with the Children's Complex of the Court after the order was passed on 02/09/2014. The Family Court found that the wife had sufficiently explained the cause for not paying the costs of Rs.5,000/- in her examination-in-chief. The Family Court has observed that though a lengthy cross-examination was conducted on the wife, nothing came out from the cross-examination of the wife to show that she has not deposited the costs of Rs.5,000/- with a *mala fide* intention. The Family Court had rightly observed that no party should be punished disproportionately and merely because the wife and her Counsel were not present in the Court on 26/09/2014, the petition could not have been dismissed. We find that in the interest of justice, the Family Court correctly observed that it would be necessary to permit the wife in the circumstances of the case to put her side before the Court. We find that the Family Court has rightly exercised the discretion in allowing the application filed by the wife for restoration of her petition for a decree of divorce as she had shown 'sufficient cause' for not remaining present on 26/09/2014.

Since we find that the judgment of the Family Court is just and proper, we dismiss the appeal with no order as to costs.

With the disposal of the Family Court Appeal, the Civil Application stands disposed of.

(SARANG V. KOTWAL, J.)

(SMT. VASANTI A. NAIK, J.)