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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL No. 37 OF 2017

WITH
CIVIL APPLICATION No.41 OF 2017
IN
FAMILY COURT APPEAL No. 37 OF 2017

Aziz Moiz Bharmal	Appellant/Applicant
Vs.	
Farzana Aziz Bharmal	Respondent

Mr. Abdul Kader Millwala for the Appellant/Applicant

Mr. Saeed Akhtar a/w. Hitesh Anil Thorat for Respondent

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

DATE : MARCH 15, 2017

P.C. :

1. Heard the learned counsel appearing on behalf of the Appellant and the learned counsel appearing on behalf of the Respondent-wife.
2. The Appellant has challenged the judgment and decree passed by Family Court at Bandra, Mumbai. By the said judgment and decree dated 12th

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August, 2016, the Family Court was pleased to grant divorce by mutual consent under section 28 of the Special Marriage Act, 1954 (for short 'the said Act').

2. Brief facts are that initially, a petition for divorce on the ground of cruelty was filed under section 27 (1) (d) of the said Act by the Respondent -wife. Thereafter, both the parties had arrived at settlement and decided to convert the said petition for divorce into a petition for divorce by mutual consent. Accordingly, the consent terms were prepared and executed between the parties. Under the said consent terms, the Respondent -wife was supposed to withdraw the criminal complaint filed by her under section 498-A of the Indian Penal Code against the Appellant. Secondly, she had agreed to prepare a gift deed in favour of the son in respect of the flat situated at Kurla. Thirdly, she had agreed not to claim maintenance from the Appellant -husband. The consent terms were filed and the Respondent-wife complied with the conditions which were agreed by her in terms of the consent terms and memorandum of understanding. The Respondent-wife also relinquished her right in respect of a flat situated at Dombivali. She also relinquished her right in respect of permanent alimony, shelter and other reliefs.

3. After the matter came up before the Family Court for passing a decree

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of divorce under section 28 of the said Act, the Appellant submitted that he wanted amendment in the consent terms. He submitted that there should be a clause in the gift deed that the son, in whose favour the gift deed was made, should not dispose of the property till he attains the age of 25 years and, secondly, the custody of the child has to be reviewed in the changed circumstances. The Sub-Registrar had refused to register the said conditional gift deed. The Respondent -wife filed an affidavit, stating therein that the said flat would not be sold till the son attains the age of 25 years. She also filed an affidavit stating therein that so far as the custody is concerned, it would be reviewed under the changed circumstances. The Respondent-wife, therefore, accepted both the conditions, which were imposed by the Appellant-husband.

4. The Family Court, after having heard the Respondent -wife's counsel and the Appellant, who appeared in person, came to a conclusion that all the conditions of the consent terms have been complied with and even the modifications, which were sought by the Appellant-husband in the consent terms, were also agreed by the Respondent -wife and, therefore, was pleased to pass the decree for divorce by mutual consent.

5. A preliminary objection is raised by the learned counsel appearing on behalf of the Respondent-wife regarding the maintainability of this appeal filed

against the consent order passed by the Family Court.

6. The learned counsel appearing on behalf of the Appellant-husband submitted that he had made an application for amendment of the consent terms and wanted to proceed with the matter on merits. The said application was filed solely on the ground that there was non-compliance of the MOU.

7. We have perused the reply filed by the Appellant-husband and in the reply, there is no averment that he had withdrawn the consent which he had given in the consent terms. The contention of the Appellant that firstly, he was not heard and secondly, he had withdrawn his consent, is not borne out from the record. Hence, we are of the view that the Family Court, after having gone through the consent terms, passed a decree of divorce under section 28 of the said Act by mutual consent, and now it is not open for the Appellant to challenge the consent decree, which was passed by the Family Court. It is obvious that the Appellant-husband now wants to harass the Respondent-wife after she had complied with all the conditions, which were put by him in the consent terms. The Respondent-wife had not only withdrawn the criminal complaint filed under section 498-A of the Indian Penal Code, but also executed a gift deed in respect of the flat situated at Kurla in favour of her son and relinquished her right in respect of the property situated at Dombivali and

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had also given up her claim regarding permanent alimony, shelter etc. Hence, the ratio of the judgment of the Apex Court in the case of **Anil Kumar Jain vs. Maya Jain [(2009) 10 SCC 415]** will not apply to the facts of the present case since in the said case, consent was specifically withdrawn. In the order passed by the Family Court, it is not mentioned anywhere that the Appellant had withdrawn his consent.

8. It is a settled position in law that ultimately the Court has to go by the record and the finding recorded by the Lower Court and not on the basis of the affidavit filed by the lawyer or the litigant. The Apex Court in the case of **State of Maharashtra Vs. Ramdas Nayak 91982 AIR 1249]** in paragraph 4 has observed as under:

“4. When we drew the attention of the learned Attorney general to the concession made before the High Court, Shir A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt.

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Judges cannot be dragged into the arena. “Judgments cannot be treated as mere counters in the game of litigation”. (Per Lord Atkinson in *Somasundaran v. Subramanian* AIR 1926 PC 136). We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in the a judgment, it is incumbent, upon the party, while the matter is still fresh in the minds of the judges, to call attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. (Per Lord Buckmaster in *Madhusudan v. Chanderbati*, AIR 1917 PC 30). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.”

9. Moreover, the Division Bench of this Court in the case of **Mr. Prakash Alumal Kalandari Vs. Mrs. Jahnavi Prakash Kalandari [2011 (4) MhLj 187]** in paragraph 16 has observed as under.

“16. As aforesaid, if the Petition is filed “simplicitor under Section 13B of the Act” for divorce by mutual consent, the Court must satisfy itself that the consent given by the parties continues till the date of granting decree of divorce. Even if one party unilaterally withdraws his/her consent, the Court does not get jurisdiction to grant decree of divorce by mutual consent in view of the mandate of Section 13B of the Act. However, the situation would be different. If the parties in the first instance resort to Petition for relief under Section 9 or 13 of the Act and during the pendency of such Petition, they decide to invite decree for divorce by mutual consent. On the basis of agreed arrangement, if the parties were to execute Consent Terms and then file a formal Petition/Application to convert the pending Petition to be treated as having been filed under Section 13B of the Act to grant decree of divorce by mutual consent, then, in the latter proceedings, before the decree is passed, one party cannot be allowed to unilaterally withdraw the consent if the other party has already acted upon the Consent Terms either wholly or in part to his/her detriment. In other words, the Court will have to be satisfied that: (i) there is sufficient, good and just cause for allowing the party to withdraw his consent, lest, it results in permitting the party to approbate and reprobate; (ii) that the other party would not suffer prejudice which is

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irreversible, due to withdrawal of the consent. If this twin requirement is not satisfied, the Court should be loath to entertain the prayer to allow the party to unilaterally withdraw his/her consent.”

The ratio of the judgment, therefore, would squarely apply to the facts of the present case.

9. We are, therefore, of the view that it will not be open now for the Appellant to contend that he had withdrawn the consent. In fact, no such finding is given by the Lower Court in its judgment and order passed on 12th August, 2016. Hence, the Family Court Appeal is dismissed. There shall be no order as to costs.

[A.S. GADKARI, J.]

[V.M. KANADE, J.]