

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.33 OF 2012

Tony Marcel Fernandes.	]	
Age – 42 years, Occupation – Business,	]	
Residing at – 8/3/3, Mount View Society,	]	
Bhavani Nagar, Marol, Andheri (E),	]	
Mumbai – 400 059.	]	... Appellant /
		Orig. Petitioner

Versus

Mrs. Zulekha Tony Fernandes.	]	
Age – 43 years, Occupation – Business,	]	
Residing at – 8/2/12, Mount View Society,	]	
Bhavani Nagar, Marol, Andheri (E),	]	
Mumbai – 400 059.	]	... Respondent /
		Orig. Respondent

Mr. G. R. Hegde for Applicant.

Mr. Mandar Limaye a/w Mr. Sagar Ambedkar for Respondent.

CORAM :- K. K. TATED &
SARANG V. KOTWAL, JJ.
DATE :- 01 FEBRUARY, 2018

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. By this Appeal, the Appellant has challenged the Judgment and Order dated 22/11/2011 passed by the learned Judge of Family Court No.5, Bandra, Mumbai, in Petition No.B-32 of 2010 whereby the Appellant's petition for divorce and custody of the child Michelle was dismissed.

2. It is the case of the Appellant in the petition filed before the Family Court, that, he is a Christian by religion and the Respondent is a Muslim. They got married according to Hindu Vedic rites and registered their marriage under the Hindu Marriage Act, 1955, on 31/05/1995. In the petition, the Appellant has further pleaded that the Appellant and the Respondent performed marriage as per Christian rites in a Church at Marol, Andheri (East), Mumbai, on 16/06/1995. They have a daughter who was about 13 years of age at the time of filing of the petition before the Family Court in the year 2010. The Appellant, in his petition before the Family Court, has further set out as to how differences grew between the couple because of the unreasonable attitude and behaviour of the Respondent. It is not necessary to go into the details of the allegations made in the petition before the Family Court because the impugned Judgment was not passed by the learned Judge of the Family Court recording his finding on these allegations.

3. The Appellant had earlier preferred Petition No.B-128 of 2008 before the Family Court, Mumbai. The Respondent – wife had challenged the maintainability of the said petition by filing her objections vide Exh.19 in Petition No.B-128 of 2008. The said petition was filed under Section 7 of the Hindu Marriage Act, 1955. A copy of the same was produced at Exh.18 in Petition No.B-32 of 2010. That was dismissed vide Order dated 04/01/2010. It was observed in the said Order that, under Section 5 of the Hindu Marriage Act, parties needed to be Hindus for performance of a Hindu marriage and since

neither of them was a Hindu, it was held that Section 7 of the Hindu Marriage Act was not applicable to that petition. It was further held that the registration of the marriage did not make it legal and valid and ultimately the petition was dismissed.

4. Subsequent to dismissal of Petition No.B-128 of 2008, the Appellant herein preferred Petition No.B-32 of 2010 before the Family Court at Bandra, Mumbai. This time, the petition was filed under Section 34 of the Specific Relief Act, 1963 read with Section 7 of the Hindu Marriage Act, 1955 and Section 7(a) of the Family Courts Act.

5. The Respondent did not file her Written Statement and the matter proceeded without Written Statement pursuant to the order dated 27/01/2011 passed below Exh.1. The Appellant filed his statement on oath in the form of Affidavit of evidence vide Exh.11 along with documents below Exh.16 and Exh.18. The Respondent did not take care to remain present for cross-examination and even the cross-examination was not conducted and vide the order dated 19/07/2011, the right of cross-examination was forfeited. Thereafter the Appellant closed his evidence.

6. In this background, the learned Judge proceeded to consider the petition on the material available before him and passed the impugned order. The learned Judge recorded a finding that the Petition No.B-32 of 2010 was hit by principle of *res judicata* as enunciated in Section 11 of The Code of Civil Procedure, 1908 (for short, 'CPC') and it was held that the Appellant was not entitled for

the reliefs sought by him. It was observed by the learned Trial Judge that all the averments in the earlier petition and the petition filed before him were one and the same and therefore, the cause of action was also the same. Thereafter, the learned Judge reproduced Section 11 of the CPC and observed that the facts at hand did not allow him to entertain the matter before him. He further observed that since the issue was decided by the Family Court by way of a detailed reasoned order in Petition No.B-128 of 2008, there was no need to enter into the same arena to find out whether the marriage between the parties was null or not. It was further observed that the learned Judge could not sit as an Appellate Court or as the Court of review and therefore, the petition was dismissed.

7. We have heard Mr. G. R. Hegde, learned Counsel for the Appellant and Mr. Mandar Limaye, learned Counsel for the Respondent. We have perused the record and proceedings carefully and after considering the submissions made on behalf of both the parties, the following points arise for our consideration.

SR. NO.	POINTS	FINDINGS
1	Whether the Appellant has made out a case for interference with the impugned Judgment and Order ?	Yes
2	Whether the learned Judge of the Family Court was right in applying principle of <i>res judicata</i> enunciated under Section 11 of the CPC to the petition before him ?	No.
3	What Order ?	As per the Final Order

REASONS

8. Mr. Hegde, learned Counsel for the Appellant, has relied on the Judgment of the Hon'ble Supreme Court in the case of **Balram Yadav Vs. Fulmaniya Yadav**¹. It is held in the said Judgment as under :

“Under Section 7(1) Explanation (b) of the Family Courts Act, 1984, a suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of the Family Court, since under Section 8 of the said Act, all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the civil courts. In case, there is a dispute on the matrimonial status of any person, a declaration in that regard has to be sought only before the Family Court. It makes no difference as to whether it is an affirmative relief or a negative relief. What is important is the declaration regarding the matrimonial status. Section 20 of the Family Courts Act also endorses the above view, since the said Act has an overriding effect on other laws.”

Thus, the Appellant was entitled to file a petition before the Family Court for declaration that the marriage was null and void.

9. From the facts narrated above, it is clear that neither of the parties is a Hindu and therefore, the earlier Petition No.B-128 of 2008 filed by the Appellant before the Family Court at Bandra, Mumbai, under Section 7 of the Hindu Marriage Act, 1955, was not tenable and it was dismissed only on that ground. In the said petition,

¹ (2016) 13 Supreme Court Cases 308

the Appellant had made several allegations against the Respondent and he had also prayed for the custody of his minor daughter Michelle. These points were not adjudicated upon and the question of custody was not decided. Though the Judgment and Order in petition No.B-128 of 2008 indicates that the learned Judge trying that petition had observed that the marriage was null and void, no decree declaring the marriage as such was passed only on the ground that the Petition itself was not maintainable. Hence, there was no adjudication of the 'lis' between the parties. Section 11 of the CPC enunciating the principle of *res judicata* are as follows :

“11. *Res judicata*.--- *No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”*

Explanation I. -----

Explanation II. -----

Explanation II. -----

Explanation IV. -----

Explanation V. -----

Explanation VI. -----

Explanation VII. -----

Explanation VIII. -----”

Thus, though the Appellant had raised issue of the marriage being null and void and though the Court had observed that the marriage was not legal, no decree was passed on the ground that the petition itself was not maintainable.

10. 'Decree' is defined under Section 2(2) of the CPC as under :

“2(2). “decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include —

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order or dismissal for default

Explanation.--- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.”

11. Thus, in the Judgment and Order dated 04/01/2010 passed in Petition No.B-128 of 2008, there were certain observations in the body of the Judgment. There was no decree or in other words, formal expression of an adjudication which conclusively determined the rights of the parties with regard to the matter in controversy in the petition. The matter in controversy in the said petition was, as to whether the marriage was null and void. Since the petition was dismissed on the ground that it was not maintainable, there was no formal adjudication of this issue. Even the question of custody of the child was not decided. Therefore, in our opinion, the principle of *res judicata* will not apply to the subsequent petition i.e. Petition No.B-32 of 2010 filed by the Appellant before the Family Court.

12. As a result of the foregoing discussion, we pass the following Order.

ORDER

- (i) The Appeal is allowed.
- (ii) The Judgment and Order dated 22/11/2011 passed by the learned Judge of Family Court No.5, Mumbai, in Petition No.B-32 of 2010, is set aside.
- (iii) The Petition No.B-32 of 2010 is remanded back for fresh adjudication on merits.
- (iv) Both the parties shall appear before the Family Court No.5, Bandra, Mumbai, on 25/03/2018. Thereafter within one month from that day, the Respondent shall file her Written Statement and the learned Judge of the Family Court shall decide the said Petition on merits and in accordance with law, after recording evidence.
- (v) The Appeal is allowed in the aforesaid terms.
- (vi) Registry is directed to sent the R & P immediately to the Family Court No.5, Bandra, Mumbai.

(SARANG V. KOTWAL, J.)

(K. K. TATED, J.)