

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 6007 OF 2018

Swati Savio D'souza Alias Swati Rathod	...Petitioner
<i>Versus</i>	
Savio D'souza	...Respondent

....
Mr. Abhijeet A. Joshi, Advocate for the Petitioner.
Mr. Jaydeep Lele i/b. Legal House, Advocate for the Respondent.
....

CORAM : R. G. KETKAR, J.
DATE : 12th JULY, 2018

P.C.

1. Heard Mr.Abhijeet Joshi, learned counsel for the petitioner and Mr. Jaydeep Lele, learned counsel for the respondent, at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 15.3.2018 passed by the learned Judge, Family Court No.6, Mumbai below Exhibit-23 in Petition No.A.2880/2014. By that order, the learned trial Judge rejected the application Exhibit-23 made by the petitioner for recalling the order dated 9.11.2016 for vacating the stay.
3. Rule. Mr. Lele waives service on behalf of the respondent. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

4. The respondent has instituted Petition No.A-880/2007 under Section 10(1)(x) of the Indian Divorce Act, 1869 (for short, 'Act') for dissolution of the marriage by a decree of divorce on the ground of cruelty. The petitioner herein filed Petition No.E-371/2011 under Section 125 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') for interim maintenance. By order dated 27.11.2013, the learned trial Judge dismissed both the Petitions. Aggrieved by the decision in Petition No.A-880/2007, the respondent filed Family Court Appeal No.67/2014.

5. The petitioner herein filed Petition No.A-2880/2014 in the Family Court at Bandra, Mumbai for dissolution of marriage on the ground of cruelty as also on the ground that during subsistence of marriage between the parties, the respondent had remarried. By order dated 9.11.2016, the learned trial Judge suo motu stayed the proceedings of Petition No.A-2880/2014 on the ground that the respondent-husband has filed Family Court Appeal No.67/2014 in this Court and the same is subjudice. As appeal is continuation of the proceedings and issue of divorce between the petitioner and the respondent is directly and substantially in issue before the High Court, in view of Section 10 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the proceedings of Petition No.A-2880/2014 are required to be stayed till disposal of Family Court Appeal No.67/2014.

6. Family Court Appeal No.67/2014 was admitted by this Court on 12.1.2017. At the same time, the Division Bench of this Court made it clear that it has not granted stay to any proceedings pending in the Family Court. The petitioner, therefore, took out application on 2.2.2017 for recalling the order dated 9.11.2016. At the same time, the petitioner instituted Writ Petition No.11152/2017 challenging the order dated 9.11.2016. On behalf of the respondent, objection was raised that the petitioner has already instituted application on 2.2.2017 for recalling the order dated 9.11.2016 and said application is still pending. In view thereof, the Petition was not entertained with direction to the learned trial Judge to decide the application dated 2.2.2017 within two weeks from the date of the order. All contentions of the parties on merits were expressly kept open. In pursuance thereof, by the impugned order, the learned trial Judge rejected the application.

7. In support of this Petition, Mr. Joshi submitted that the learned trial Judge rejected the application mainly on the ground that the petitioner has not made clear as to under what provision the application is made and how it is maintainable. The order dated 9.11.2016 also cannot be reviewed as the provisions of C.P.C. are also not attracted unless it is brought to the notice of the Court that there is any apparent error or mistake committed while passing the order. The other ground given by

the learned trial Judge was that the petitioner could have challenged the order dated 9.11.2016 before the higher Court instead of filing application for recalling the order, which is not tenable.

8. A perusal of the impugned order shows that though the respondent had raised objection in this Court in entertaining the Writ Petition, even before the Family Court the respondent opposed the application on the ground of maintainability. Be that as it may.

9. Mr. Lele has invited my attention to the findings recorded by the learned trial Judge in order dated 27.11.2013 while dismissing respondent's petition and in particular paragraph-48 to contend that the case of the petitioner herein is that the respondent remarried during the subsistence of the first marriage was accepted and against that order as the respondent-husband has preferred substantive appeal. The matter is subjudice in this Court and, therefore, the learned trial Judge was justified in staying the petition filed by the petitioner. I do not find any merit in this submission. As noted earlier, the petitioner has instituted petition before the Family Court on the ground of cruelty and remarriage of the respondent during subsistence of first marriage. A perusal of paragraph-48 of the trial Courts order dated 27.11.2013 shows that the learned trial Judge after considering the evidence on record held that the respondent was having extra marital relations and out of that relation one

child was born. In other words, the learned trial Judge has not accepted the case of the petitioner herein that during subsistence of first marriage, the respondent has remarried. Apart from this, the petitioner has sought divorce on the ground of cruelty. Though the respondent also sought divorce on the ground of cruelty, it cannot be said that the allegations in both the petitions are identical. In view thereof, the learned trial Judge was not justified in the first place, passing the order dated 9.11.2016 and secondly, rejecting the application Exhibit-23.

10. In the result, petition succeeds. Order dated 9.11.2016 as also the order dated 15.3.2018 below Exhibit-23 are set aside. Stay granted by the learned trial Judge to the proceedings of Petition No.A-2880/2014 stands vacated. The learned trial Judge will proceed with the petition in accordance with law. All contentions of the parties on merits are expressly kept open. Liberty to apply to the trial Court for expeditious disposal of the Petition. If such an application is made, the learned trial Judge will pass appropriate orders. Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

Pradipkumar
Prakashrao
Deshmane
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Pradipkumar
Prakashrao
Deshmane
Date: 2018.07.20
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(R. G. KETKAR, J.)

Deshmane (PS)