

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10954 OF 2018

Anil Tukaram Gawde ... Petitioner
Vs.
Sunita Anil Gawade and another ... Respondents

Mr. P. M. Khankar for Petitioner.
Mr. A. R. Metkari, AGP for Respondent No.2-State.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 15, 2018

P.C. :

Heard Mr. Khankar, learned Counsel for the petitioner and Mr. Metkari, learned AGP for the respondent No.2 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the order dated 05.01.2018 passed by the learned Judge, Family Court No.2, Pune in Darkhast No.5 of 2016. By that order, the learned Judge issued attachment warrant through the Collector, District Pune in respect of the following properties:

Gat No.24, 44, 47, 113, 126, 257 and 279 of Village Dhanore,
Taluka Khed, District Pune

and issued direction to Tehsildar, Taluka Khed, District Pune for attaching the share of the petitioner and selling the properties to the extent of outstanding dues.

3. In support of this Petition, Mr. Khankar submitted that petitioner and respondent No.1 herein have instituted Petition F.No.273 of 2006 under Section 13B of the Hindu Marriage Act, 1955 (for short 'Act') for dissolution of marriage by mutual consent. By order dated 25.07.2006, the Petition was allowed by the Family Court and the marriage between the petitioner and the first respondent solemnized on 02.03.1990 was

dissolved by a decree of divorce by mutual consent under Section 13 B of the Act from the date of the order i.e. 25.07.2006. The learned Judge held that respondent No.1 is entitled to withdraw amount of Rs.62,000/- lumpsum maintenance for herself and her daughter after judgment. The permanent custody of daughter Kalyani was to be retained by respondent No.1.

4. Mr. Khankar submitted that in pursuance of that order, petitioner has paid Rs.62,000/- to the respondent No.1 as is evident from the order dated 25.07.2006 passed by the learned Family Court. He submitted that despite that, respondent No.1 filed proceedings before the Family Court, Pune claiming Rs.5,00,000/- towards marriage expenses of daughter Kalyani. By order dated 01.08.2015, the learned Judge allowed the proceedings and directed the petitioner herein to pay Rs.4,63,547/- towards marriage expenses of Kalyani together with interest @ 6% from the date of marriage till filing of the proceedings and from filing of the Suit till actual realization @ 6% p.a. as per Section 34 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'). He submitted that aggrieved by that decision, petitioner instituted proceedings under Order IX, Rule 13 of C.P.C. for setting aside ex-parte decree. As there was delay of 57 days in filing the application, Civil Miscellaneous Application No.107 of 2015 was filed. By order dated 21.03.2017, the learned Judge rejected that application. He submitted that respondent No.1 filed Darkhast on 04.01.2016 for recovery of Rs.4,63,547/- together with interest. Respondent No.1 claimed Rs.5,61,172/-. Mr. Khankar submitted that in the first place, respondent No.1 having received Rs.62,000/- was not justified in filing proceedings for claiming marriage expenses of daughter Kalyani. Secondly, as the petitioner filed application under Order IX, Rule 13 of C.P.C. for setting aside ex-parte decree dated 01.08.2015 along with application for condonation of delay and the same is pending, respondent No.1 was not justified in filing the

execution proceedings. In fact, respondent No.1 is precluded from filing execution proceedings as the petitioner had filed proceedings challenging the ex-parte order. In support of these submissions, he relied upon Order XXI, Rule 11(2) of C.P.C. Order XXI, Rule 11(1) speaks about making of oral application in respect of decree for payment of money. Sub-rule (2) thereof lays down that save as otherwise provided by sub-rule (1), every application for execution of the decree has to be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court in terms of clauses (a) to (j) thereof. He submitted that petitioner is ready to deposit Rs.1,50,000/- in this Court.

5. I have considered the submissions advanced by Mr. Khankar. I have also perused the material on record. As noted earlier, respondent No.1 had filed proceedings for recovery of marriage expenses. That was allowed as far as back on 01.08.2015. It is not in dispute that petitioner has not paid that amount. As the petitioner failed to pay that amount, respondent No.1 filed Darkhast on 04.01.2016. The application made by the petitioner for condonation of delay in filing the application under Order IX, Rule 13 of C.P.C. was rejected by the learned Judge on 21.03.2017. It is thereafter respondent No.1 filed proceedings for attachment of share of the petitioner in the lands specified in the order. Mr. Khankar submitted that as the petitioner has filed application under Order IX, Rule 13 of C.P.C. for setting aside ex-parte decree along with application for condonation of delay, respondent No.1 is precluded from filing execution proceedings. He however could not substantiate this submission either by principle or precedent.

6. Order XLI, Rule 5(1) of C.P.C. lays down that an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a

decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree. In other words, filing of an appeal does not automatically operate as a stay of the proceedings under a decree or the order appealed from. In the present case, the learned trial Judge has directed the petitioner herein to pay Rs.4,63,547/- together with interest @ 6% p.a. It is also not in dispute that petitioner has not complied that decree. In the case of ***Bhogvati Sahakari Sakhar Karkhana Limited vs. Chaugule and Son***, AIR 2003 Bombay 185, the learned Single Judge considered Bombay amendment to Order XLI, Rule 1(3) of C.P.C., which is to the following effect:

"(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate; Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit."

7. The matter was heard on earlier occasion so as to enable Mr.Khankar to take instructions as to within what time petitioner will deposit entire decretal amount in this Court. On instructions, he submits that at the highest, petitioner is ready and willing to deposit Rs.1,50,000/-. Having regard to the fact that the amount comes to Rs.5,61,000/-, I do not find that any case is made out for acceding to the request made by Mr. Khankar. In the case of ***Bhogvati Sahakari Sakhar Karkhana*** (*supra*), the learned Single Judge of this Court considered provisions of Order XLI, Rule 1(3) and Rule 5 of C.P.C. In paragraphs 10 and 18, it was observed thus,

"10. A judicial note, at this stage, can be taken that in our country it is said that it is easy to obtain decree but difficult to execute it. If the power under Order 41, Rule 1(3) of Civil Procedure Code is exercised by the Appellate Court, upon prima facie satisfaction; then, in that event, exercise of such power will result in realisation of the fruits of the decree. The provision made under Order 41, Rule 1(3) of Civil Procedure Code appears to be in public interest with intention to shorten the length and width of the unnecessary

litigation and to prevent multiplicity of the proceedings and at the same time to help the decree holder to realise the fruits of the decree obtained by him. This often not used provision needs to be activated and put into operation considering the flooded corridors of the Court which, in my view, would not only serve the ends of justice between the parties but serve the cause of administration of justice.

18. It is true that, at the time of exercising this discretionary power the Appellate Court has to take into account the nature of the decree, legal challenges set up in the appeal including strength thereof. Discretion has to be exercised judiciously keeping in mind that interest of justice and Rule of law can only be served by shortening the length and breadth of the litigation and preventing multiplicity of the proceedings; so as to help early disposal of cases in the lower courts.”

8. In view thereof, no case is made out for interfering with the impugned order. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

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