

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
CIVIL APPLICATION NO.567 OF 2016
IN
FCA/12/2012
WITH
CIVIL APPLICATION NO.568 OF 2016
IN
FCA/13/2012**

Mrs. Dipti w/o Pushpadant Sahuji ..Applicant

VERSUS

Mr. Pushpadant s/o Vinod Sahuji ..Respondent

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Mr. Hemant Surve, Advocates for the Applicant.

Mr. R. N. Dhorde, Senior Advocate for Respondent.

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**CORAM : S. V. GANGAPURWALA &
A. M. DHAVALA, JJ.**

Closed for Orders on : 22.02.2019.

Order Pronounced on : 01.03.2019.

FINAL ORDER (Per S. V. Gangapurwala, J.) :-

1. The present civil applications are filed seeking permission to pay cost amount of Rs.25,000/-.

2. The present applicant filed Family Court Appeals bearing no.12/2012 and 13/2012 along with application for stay bearing Civil Application No.9943/2012. This Court on 07.09.2012, passed interim order directing the present respondent not to get married to another woman. The said relief was continued from time to time. The Family Court Appeals were fixed for final hearing on 23.09.2014 at 2.30 pm as per the order of this Court dated

15.09.2014. On 23.09.2014 the present applicant did not remain present. On 23.09.2014 this Court dismissed the Appeals by passing the following order:

"1. Learned counsel for the appellant stated that yesterday evening his client came and asked him not to conduct the appeal. He, therefore, placed on record her written instructions. On last occasion the appellant was present before the Court along with her brother. Today neither she nor her brother are present before the Court. It is however surprising to note that though the appellant directed her Advocate to not to argue her case, she does not remain present before the Court though the appeals were specifically fixed for final hearing today. It means that the appellant is not interested in pressing the appeals. Both the appeals are dismissed for default. Interim orders passed during pendency of the appeals stand vacated.

2. In view of dismissal of both the appeals, Civil Application No. 9943 of 2012 stands disposed of."

3. The present applicant thereafter filed civil application bearing no.10009/2014 and civil application no.10010/2014 for restoration. Under order dated 16.01.2015 we had allowed the civil applications for restoration on condition of depositing cost of Rs.25,000/- in each appeal. The operative part of the order reads thus:

"(a) The order dated 23rd September, 2014 dismissing the appeals in default stands recalled and the appeals are restored to the file on condition that the applicant pays cost of Rs.25,000/- in each appeal to the non applicant.

(b) The payment of cost shall be the condition

precedent.

(c) The applicant shall pay cost on or before 28.01.2015.

(d) On payment of cost, place the matter before the Court dealing with the family Court appeals on 29.01.2015 so as to enable the Court to pass such further orders."

4. The applicant was directed to deposit cost of Rs.25,000/- in each appeal by 28.01.2015. Instead of depositing the cost the applicant moved civil application bearing no.947/2015 and civil application no.948/2015 for modification of the order dated 16.01.2015 to the extent of payment of cost of Rs.25,000/- in each application through another lawyer. The said applications were rejected under order dated 23.01.2015. Thereafter, on 19.11.2015, the applicant filed instant applications for permission to pay cost. The applications though are sworn on 19.11.2015 the circulation for the first time was sought on 18.12.2015. The Court thereafter, kept the matter as per CMIS date. Reply was filed by respondent.

5. Mr. Surve, learned counsel for the applicant submits that the applicant was totally dependent upon the interim alimony granted to her. The non-applicant periodically credited the said amount. From the amount credited before this Court the applicant would be in a position to pay the cost amount. It was only on 23.09.2015 the amount covering the cost amount is credited by respondent and the same is withdrawn subsequently by the

applicant and that is how the applicant would be in a position to pay the cost. The cost be accepted. The learned counsel submits that the hearing on the present application is adjourned at the request of the non-applicant. The affidavit is filed by the non-applicant only on 20.08.2017. The respondent cannot be allowed to take the advantage of his own wrong and now contend that the non-applicant has remarried on 25.04.2018 with one Shila Bhimrao Patil. The learned counsel submits that on one hand the non-applicant was adjourning the matter and now cannot take a stand that he has remarried. More particularly, when the instant application was pending before this Court. The learned counsel submits that the applicant be given opportunity to contest the Appeal on merits.

6. Mr. Dhorde, learned senior counsel submits that the intention of the applicant is only to harass the non-applicant. In the appeal the non-applicant was prevented from performing marriage during the pendency of the appeals and as such the appeals were prolonged from time to time by the applicant. On the day fixed for hearing of the appeal the applicant was absent, though the date and the time was fixed in her presence. The appeal came to be dismissed in default. Thereafter, civil applications for restoration are allowed on payment of cost of Rs.25,000/-. The same was not deposited. Instead the applications were moved for setting aside the condition of payment of cost.

The said civil applications were also rejected and after lapse of 10 to 11 months the present applications are filed. This shows the intention of the applicant in harassing the non-applicant. The applications are not bonafide. The non-applicant has already remarried on 25.04.2018. The certificate to that effect is also filed. The marriage of the present non-applicant with the applicant was not subsisting at the time the non-applicant married with one Shila Bhimrao Patil on 25.04.2018 and the said marriage is also protected. The learned counsel relies on the judgment of the Apex Court in a case of **Mr. Anurag Mittal Vs. Mrs. Shaily Mishra Mittal** in **Civil Appeal No.18312 of 2017** dated August 24th, 2018. The applications are not bonafide and deserves to be rejected.

7. We have considered the submissions canvassed by the learned counsel for the respective parties.

8. The present non-applicant had filed petition for divorce bearing no.138/2009 and the present applicant had filed petition for restitution of conjugal rights bearing no.163/2009. The petition filed by the non-applicant for divorce came to be allowed under the order dated 17.07.2012 and the petition filed by the present applicant for restitution of conjugal rights came to be dismissed on the same day by the Judge, Family Court. Aggrieved by the judgment and order passed by the

Judge, Family Court allowing the petition for divorce filed by the non-applicant and dismissing the petition filed by the applicant for restitution of conjugal rights, the applicant preferred Family Court Appeals bearing no.12/2012 and 13/2012. In the Appeals order was passed restraining the non-applicant from performing marriage with another woman. On 15.09.2014 the present applicant and her brother it appears were present in the Court and in their presence the appeals were fixed at 2.30 pm on 23.09.2014 for hearing. According to the applicant the lawyer appearing for the applicant was discharged by the applicant on 21.09.2014. On 23.09.2014 the applicant did not remain present in the Court. According the applicant her lawyer was discharged on 21.09.2014, however, the applicant did not make any arrangement and the Court on 23.09.2014 dismissed both the Family Court Appeal. Pursuant thereto, the civil applications were filed for restoration of the said second appeals. We had allowed the said civil applications under order dated 16.01.2015 directing the applicant to deposit the cost of Rs.25,000/- in each appeal on or before 28.01.2015. Thereafter, immediately civil applications were filed for modification of the order to the extent of setting aside the order directing deposit of cost of Rs.25,000/- and/or time be granted of ten months to deposit the cost. The said applications were rejected by this Court on 23.01.2015 and after about ten months the

present civil applications are filed seeking leave to deposit the cost.

9. During the pendency of these applications the non-applicant had married with another woman as contented by him on 25.04.2018. The aforesaid proceedings would go to show that the applicant was protracting the matter. Thrice the applicant changed the lawyers. The learned Advocate engaged to work out the appeals that were specifically fixed at 2.30 pm on 23.09.2015 was discharged by the applicant on 21.09.2015 and did not make alternate arrangement and allowed the appeal to be dismissed for non-prosecution. Thereafter, civil applications for restoration were filed through another Advocate. The said civil applications were allowed subject to payment of cost. Thereafter, another civil application was filed for setting aside the amount of cost by engaging another lawyer and now the instant application is filed. We do not find the application to be bonafide. For ten months after the applications for setting aside the condition of cost were rejected, the applicant did not file any application. It would be difficult to accept the contention of the applicant that the applicant had no means to pay the cost. At the time the non-applicant has remarried the marriage between the applicant and non-applicant was not subsisting. The appeal was already dismissed. The marriage of the present non-applicant with another woman namely Shila Bhimrao Patil would not be

invalid or void. The marriage cannot be said to be nullity. As per the judgment of Family Court the applicant and non-applicant are not residing together atleast since 2009 for more than 10 years. We do not find that this application was made bonafide. Though Section 148 of Code of Civil Procedure is directory, the facts of the present case do not persuade us to exercise our discretion.

10. In view of the above, the civil applications are rejected. No costs.

(A. M. DHAVAL)
JUDGE

(S. V. GANGAPURWALA)
JUDGE

Devendra/February-19