

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3967 OF 2019

Sarfaraz Abu Horera Malik ... Petitioner
Vs.
Principal Judge, Family Court and another ... Respondents

Mr. Rakesh Singh for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : APRIL 9, 2019

P.C. :

Not on Board. At the request of Mr. Singh, learned Counsel for the petitioner, taken up in the production Board.

2. This Petition takes exception to the judgment and decree dated 30.11.2018 passed by the learned Principal Judge, Family Court, Mumbai in Petition No.F-1247 of 2018. By that order, the learned trial Judge dissolved the marriage between the parties by a decree of divorce by mutual consent under Section 28 of the Special Marriage Act, 1954. The matter was heard on 04.04.2019 and was listed today so as to enable Mr. Singh to examine whether Petition is maintainable and whether petitioner has an equally efficacious alternate statutory remedy. Attention of Mr. Singh was also invited to Order XLIII, Rule 1-A(2) of the Code of Civil Procedure, 1908 (for short 'C.P.C.') as well as decision of the Apex Court in the case of **Banwari Lal Vs. Chando Devi, (1993) 1 SCC 581**.

3. Mr. Singh has also tendered decision of the Division Bench of Patna High Court in **Pushpa Devi Vs. Tinku Kumar**, 2018 2 PLJR 750. In this case, the Division Bench of Patna High Court referred to the

decision of Banwari Lal (supra) as also Order XLIII, Rule 1-A(2) of and Section 151 of C.P.C. In paragraph 12, the Division Bench observed thus,

“12. We are of the view that in the case of judgment passed on consent given by the parties, if it is alleged by one of the parties that such judgment was obtained by fraud, collusion, coercion and misrepresentation then that would vitiate the entire proceedings. In such a situation, the appeal would be available even in presence of bar created under Section 19 (2) of the Act which would only be applicable where the factum of compromise or agreement is not in dispute. However, at the same time, a remedy would also be available for the parties to move before the same Court under Section 151 CPC for recall of the judgment/decree.”

4. The Division Bench held that appeal would be available even in the presence of bar created under Section 19(2) of the Family Courts Act, 1984, which would only be applicable where the factum of compromise or agreement is not in dispute. At the same time, a remedy would also be available to the party to move before the same Court under Section 151 of C.P.C. for recalling the judgment / decree. The Division Bench accordingly held that the Appeal is maintainable.

5. In view thereof, Mr. Singh seeks permission to withdraw the Petition with liberty to file appropriate proceedings.

6. On the motion made by Mr. Singh, Petition is allowed to be withdrawn with liberty as prayed for. It is made clear that I have not examined the merits of the case. Order accordingly.

(R. G. KETKAR, J.)