

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.3664 OF 2019**

Deepmala Satyawar Patra	]	Petitioner
Vs.		
Satyawan Patra	]	Respondent

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Mr. Y.E. Mooman, learned Counsel for the Petitioner.
Ms. Kamana Kapoor, learned Counsel for the Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 3rd APRIL, 2019.

P.C.

Heard Mr. Mooman, learned Counsel for the petitioner and Ms. Kapoor, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner/wife has challenged the order dated 9th January, 2019 passed by the learned Judge, Family Court No.2, Bandra, Mumbai below Exhibit 14 in Petition No. A-601 of 2017. By that order, the learned Judge allowed the application made by the respondent/husband seeking permission to withdraw the consent given by him for dissolving the marriage by mutual consent as contemplated under section 13-B of the Hindu Marriage Act, 1955 (for short 'Act').

3. Rule. Ms. Kapoor waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of

learned Counsel for the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. Ms. Kapoor raised preliminary objection as regards maintainability of the Petition under Article 227 of the Constitution of India. In support of her submission, she heavily relied on;

[1] decision dated 26th August, 2008 in **Writ Petition No.3556 of 2008 in Rajesh s/o Pratap Sainani Vs. Bhavna w/o Rajesh Sainani** and in particular paragraph 36 thereof.

[2] decision of Division Bench of this Court in **Prakash Alumal Kalandari Vs. Jahnavi Prakash Kalandari, 2011 (4) Mh. L. J 187.**

Relying upon these decisions, Ms. Kapoor submitted that remedy available to the petitioner is to file Family Court Appeal in this Court and not a Writ Petition.

5. In the case of **Rajesh** (supra), the Petition was instituted under Article 227 of the Constitution of India challenging the order passed by the Family Court, Mumbai refusing to permit the petitioner to withdraw consent which was given at the time of presenting petition for divorce by mutual consent under section 13-B of the Act. In paragraph 36, it was observed thus;

“Having said so, I am also prevented by the parameters of interference by the High Court in the petition filed under Article 227 of the Constitution of India to interfere with the impugned order in view of the Law holding filed in this behalf enumerated herein below”.

Ms. Kapoor was not in a position to demonstrate that contention was raised as regards maintainability of the Writ Petition under Article 227 of the Constitution of India and any finding recorded in that regard. The decision, therefore, does not support the submission advanced by Ms. Kapoor that the Petition under Article 227 of the Constitution of India challenging the impugned order is not maintainable.

6. In so far as reliance on the decision in **Prakash's** case (supra) is concerned, a perusal of that decision indicates that appeal was filed challenging the judgment and decree dated 31st March, 2009 passed by the Family Court Pune in Petition No. A-877 of 2007. Section 19 of the Family Courts Act, 1984 deals with the remedy of appeal. In the present case, the Family Court has not passed any decree which can be challenged by filing appeal under section 19 of the Family Courts Act. In view thereof, the said decision also does not lend support to the contention of Ms. Kapoor that the Petition under Article 227 of the Constitution of India is not maintainable and, therefore, I do not find any merit in the preliminary objection raised by Ms. Kapoor.

7. This brings me to the merits of the case. It has come on record that marriage between the parties was solemnized on 5th July, 2010 as per Hindu Religious Rites. Out of this wedlock, daughter Aarya is born on 30th March, 2011. The respondent instituted Petition No.601 of 2017 in the Family Court, Bandra, Mumbai on 27th February, 2017 claiming divorce under section 13 (1) (i-a) of the Act. After service of summons, the petitioner appeared before the Family Court. The parties were referred to Marriage Counsellor. On 13th July, 2017, the parties entered into the consent terms. The consent terms were duly signed by the parties and the Advocate for the petitioner.

8. Clauses 3 to 13 of the Consent Terms read thus;
- “[3] There is a baby girl namely 'Aryaa' from the said wedlock and the custody of the said minor daughter shall be permanently with the Respondent.
- [4] The Petitioner has agreed to pay a sum of Rs.7,00,000/- (Rs. Seven lacs only) through Demand Draft to the Respondent as a reimbursement towards marriage expenses, cost of gifts, valuable articles and gold ornaments.
- [5] The Petitioner has also agreed to pay a sum of Rs.7,00,000/- (Rs. Seven Lacs only) through Demand Draft to the Respondent towards one time alimony and the Respondent shall not claim any other amount except the said amount at present as well as in future. In short the Respondent has waived her right of maintenance against the petition at present as well as in future except the above said amount.
- [6] The Petitioner has agreed to pay a sum of Rs.6,00,000/- (Rs. Six lacs only) to the Respondent towards daughter Aryaa's one time maintenance for her future. The Respondent has waived her right of maintenance for the minor daughter permanently except the above said amount of Rs.6,00,000/- (Rupees Six Lakhs only). The said amount shall be paid to the Respondent through Fixed Deposit. It has been agreed between the parties that the Petitioner shall open a Fixed Deposit amount of Rs.6,00,000/- (Rupees Six Lakhs only) with SBI, Tardeo Branch, Mumbai. For the said fixed deposit, the Grand-father namely Mr. Sushil Kumar Bishoyee and Grand-

mother namely Mrs. Suprava Sushil Bishoyee shall be the nominee. It has also been agreed that the joint account shall be opened with SBI, Tardeo Branch, Mumbai in the name of Ms. Aryaa Patra and Deepmala Patra and the interest on the fixed deposit shall be credited in the said joint saving bank account.

- [7] The said amount i.e Rs.14,00,000/- (Rupees Fourteen Lakhs Only) shall be paid by the Petitioner to the Respondent through Demand Draft on the date of passing decree and not before; preferably in between January-February 2018.
- [8] Both the parties shall be at the liberty to resettle in their life and shall not interfere in each other's life in future, after passing the decree of divorce by this Court.
- [9] Both the parties shall not file any civil and/or criminal proceedings, against each other, at present and in future.
- [10] Both the parties shall not have any claim over the movable (wrongly typed as 'moveable') or immovable (wrongly typed as 'immoveable') property of each other presently as well as in future.
- [11] The Petitioner shall not keep any relations with the minor daughter "Aryaa" and shall not for custody or access at present as well as in future also. The Petitioner has waived his right of access with the minor daughter "Aryaa" permanently.
- [12] In view of the above settlement, there shall not be any claim of whatsoever nature against each other or in future.

[13] The above consent terms are read over and explained to the parties before execution”.

9. The consent terms were filed on 16th August, 2017 and were marked as Exhibit 12. The matter was adjourned to 6th January, 2018 for compliance of the consent terms. On 6th January, 2018, the petitioner was present. Application Exhibit 13 was made on behalf of the respondent for adjournment. The case was adjourned for compliance of the consent terms to 9th March, 2018. On 9th March, 2018, the respondent filed application Exhibit 14 seeking permission to withdraw the consent terms unilaterally. In that application, the respondent contended that he had attended birthday party celebration of one his relatives on 7th January, 2018 at Budhavihar Jaitwan, Tagore Nagar, Mumbai where the petitioner herein and her relatives were present. In the birthday party, relatives of the petitioner have beaten the respondent black and blue and also threatened and abused the respondent by saying 'bahar nikalkar tuzhe dekh lenge”. The respondent further contended that he has lodged F.I.R No.67 of 2018 on 26th February, 2018 under section 141, 143, 147, 149, 323, 594, 506 Indian Penal Code 1860 (for short 'I.P.C') against the relatives of the petitioner namely Mr. Suraj Trinath Sahu, Rohit Santosh Panda, Mrs. Pramila Raghav Bishoyee, Mrs. Pratima Pavitra Sahu and Mr. Aakash Pravitra Sahu at Vikhroli Police Station. It was further contended that the respondent had suffered serious injuries on his body due to which he had been given injections by the Doctor and was also advised to undergo Sonography and X-Ray Test. Due to the said incident, the respondent and his family members are under tremendous psychological pressure and they are under constant fear for their life. The respondent had also narrated all the above incidents in press conference with the local news channels and also stated that he is constantly under fear due to such cruel behaviour of

the petitioner and her relatives. The relatives of the petitioner have threatened him that they will kill him once he gives money to the petitioner-wife. In view thereof, he is under tremendous trauma and fear for his life and he does not want to take any risk for his life by giving the alimony of Rs.20,00,000/- to the petitioner. The respondent does not want to pay even single penny to the petitioner as alimony. He, therefore, wants to unilaterally withdraw the consent terms drawn between the parties. The respondent alleged that the Police machinery instead of investigating the matter have registered FIR against the respondent and his relatives.

10. The petitioner herein filed reply opposing the application. She also filed written submissions on 15th December, 2018. In paragraph 8 of the written submissions, it was contended Pramila and Pratima are the maternal sisters of the respondent herein i.e daughters of real maternal uncle. The petitioner has no concern with the alleged episode of 7th January, 2018. It is not the case of the respondent that the petitioner was present and was participated in the alleged incident of 7th January, 2018.

11. By the impugned order, the learned trial Judge allowed the application and set aside the consent terms and directed the parties to proceed with the matter.

12. In support of this Petition, Mr. Mooman submitted that the petitioner herein was not present when alleged incident of 7th January, 2018 took place. He submitted that in fact Pramila and Pratima are the maternal sisters of the respondent herein i.e daughters of real maternal uncle. He further submitted that though the respondent alleged that the incident took place on 7th January, 2018, F.I.R was lodged on 26th

February, 2018. That apart, the respondent did not file application immediately after the alleged incident of 7th January, 2018 for withdrawal of the consent terms unilaterally. The respondent filed application Exhibit 14 only on 9th March, 2018 which was the next date for reporting compliance of the consent terms. He submitted that the learned trial Judge did not appreciate the fact that the petitioner was nowhere involved in the alleged incident of 7th January, 2018. On one hand, the respondent has lodged F.I.R against certain persons and on the other, even F.I.R is lodged against the respondent. He submitted that as the petitioner herein is not involved in the alleged incident, the learned trial Judge was not justified in allowing the respondent to withdraw the consent terms unilaterally. The consent terms were signed by the parties after they were read over and explained to them before execution. He, therefore, submitted that the impugned order deserves to be set aside.

13. Mr. Mooman submitted that the Court cannot unilaterally allow the party to withdraw the consent terms unless the Court is satisfied that;

- (a) there is sufficient, good and just cause for allowing the party to withdraw his consent, lest, it results in permitting the party to approbate and reprobate;
- (b) that the other party would not suffer prejudice which is irreversible, due to withdrawal of the consent. If this twin requirement is not satisfied, the Court should be loath to entertain the prayer to allow the party to unilaterally withdraw his/her consent.

If these two requirements are not satisfied, the Court should not entertain the prayer to allow the party to unilaterally withdraw the consent terms. In

the present case, there is no sufficient or just cause established by the respondent for permitting him to withdraw his consent. In support of his submission, he relied on the decision in **Prakash Kalandari** (supra).

14. On the other hand, Ms. Kapoor supported the impugned order. She contended that in the application Exhibit 14, it was averred that on 7th January, 2018, the petitioner herein and her relatives were present. She fairly stated that the petitioner was not present. She, however, submitted that real aunt of the petitioner Pramila and Pratima were present. She has taken me through the affidavit in reply dated 27th March, 2019 filed by the respondent. She fairly stated that documents in compilation tendered by her at Exhibit B, Pages 76 to 87 are not on record of the trial Court. F.I.R dated 26th February, 2018 lodged by the relatives of the petitioner herein at Exhibit C pages 88 to 122 is not on record of the trial Court. F.I.R No.67 of 2018 filed by the relatives of the petitioner is on record of the trial Court. Final report submitted under section 173 of the Cr.P.C running from 128 to 181 is not on record. Even the photographs at Exhibit D Even photographs at Exhibit D, Pages 182 to 243 are not on record.

15. Ms. Kapoor submitted that clause 6 of the consent terms required the respondent to pay a sum of Rs.6,00,000/- and the said amount was to be invested in a fixed deposit. Clause (7) thereof required the respondent to pay Rs.14,00,000/- at the time of passing decree of divorce by mutual consent. She submitted that clauses (6) and (7) have not been acted upon. She submitted that as the respondent was mercilessly beaten by the relatives of the petitioner, he is not ready and willing to give divorce by mutual consent. Relatives of the petitioner cannot take law in their hands. Because of F.I.R filed by the relatives of the petitioner, the

respondent had to apply for anticipatory bail. She, therefore, submitted that no case is made out for interfering with the impugned order.

16. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As mentioned earlier, the respondent has instituted proceedings under section 13 (i-a) on 27th February, 2017. After service of the summons, the petitioner appeared before the Family Court and the parties were referred to the marriage Counsellor. On 13th July, 2017, the parties entered into the consent terms. Consent terms were read over and explained to them before execution and accordingly they have signed the consent terms.

17. Consent terms were presented before the Family Court on 16th August, 2017 and marked as Exhibit 12. The matter was thereafter posted on 6th January, 2018 for reporting compliance of the consent terms. On 6th January, 2018, the petitioner was present in the Court. The respondent was absent. His Advocate was present. Application Exhibit 13 was filed on his behalf for adjournment. He was not in town. In view thereof, case was adjourned to 9th March, 2018 for reporting compliance of the consent terms. It is the case of the respondent that on the very next date i.e on 7th January, 2018, when he attended birthday party at Budhavihar Jaitwan, Tagore Nagar Mumbai, he was assaulted by the relatives of the petitioner. Though, it is averred in the application Exhibit 14 that the petitioner was present at the time of incident, during the course of hearing, it is conceded that the petitioner was not present. Even otherwise, a perusal of F.I.R No.67 of 2018 registered by the respondent does not indicate presence of the petitioner at the time of the alleged incident.

18. It is also material to note that though the incident allegedly took place on 7th January, 2018, the respondent lodged F.I.R on 26th February, 2018. Even, the respondent did not immediately file application before the Family Court after alleged incident of 7th January, 2018 for withdrawal of the consent terms unilaterally. The respondent waited till next date of hearing which was 9th March, 2018 for withdrawal of the consent terms.

19. In the case of **Prakash** (supra), the Division Bench of this Court has held that when a party applies for withdrawal of the consent terms unilaterally, the Court is to be satisfied that;

- (a) there is sufficient, good and just cause for allowing the party to withdraw his consent, lest, it results in permitting the party to approbate and reprobate;
- (b) that the other party would not suffer prejudice which is irreversible, due to withdrawal of the consent. If this twin requirement is not satisfied, the Court should be loath to entertain the prayer to allow the party to unilaterally withdraw his/her consent.

20. In the present case, though this decision was cited before the learned trial Judge, he has not recorded any finding in that regard. That apart, the learned trial Judge also did not appreciate the fact that the incident allegedly took place on 7th January, 2018 and the respondent had lodged F.I.R on 26th February, 2018. The learned trial Judge has not considered whether the respondent has given any explanation for filing F.I.R nearly after one and half month after the alleged incident. The learned trial Judge has also not considered the fact that the respondent did not immediately file application for withdrawal of the consent terms

unilaterally and waited till 9th March, 2018 being next date of hearing.

21. In view thereof, the impugned order cannot be sustained and deserves to be set aside and is accordingly set aside. Petition succeeds. Application Exhibit 14 in Petition No. A-601 of 2017 is restored to the file of the Family Court. The learned Judge is requested to decide application Exhibit 14 after considering the merits of the case and in accordance with law and uninfluenced by the observations made in this order. All contentions of the parties including the contentions recorded in this order are kept open. Rule is made absolute accordingly with no order as to costs. The parties shall appear before the Family Court on 15th April, 2019 and for that purpose, no fresh notice be issued to them. The learned Judge will thereafter fix a suitable date and within four weeks therefrom will decide the application Exhibit 14. Order accordingly.

22. At this stage, Ms. Kapoor orally applies for stay of this order for a period of six weeks and assures that no further extension shall be sought.

23. In view thereof, this order shall remain stayed for a period of six weeks from today. Order accordingly.

[R.G. KETKAR, J.]