

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.191 OF 2019
IN
NOTICE OF MOTION NO.2387 OF 2018
IN
SUIT NO.1412 OF 2018

Sheetal Devang Shah

Applicant

versus

Mahendra Shah and others

Respondents

Ms.Sheetal Shah, applicant-in-person, present.

Mr.Vivek Kantawala with Mr.Amey Patil, Mr.Vivek M. Sharma,
Mr.Shanay Bafna I/by M/s.Vivek Kantawala & Co. for respondent
nos.1 and 2.

Mr.P.R.Yadav for respondent no.3.

CORAM : B.P.DHARMADHIKARI AND
PRAKASH D. NAIK, JJ.

DATE : 22nd April 2019

PC :

1. This appeal challenges the order dated 11th October 2018 passed by learned Single Judge of this Court on Notice of Motion No.2463 of 2018 in Suit No.1412 of 2018. By that order the learned Single Judge has accepted the fact that present appellant (defendant no.2 before learned Single Judge) could not appear at 3 pm when the matter was called out. This order dated 11th October 2018 is passed after 8 o'clock in the evening and because of said inability the matter was adjourned to next day with clarification that defendant no.2 would not be allowed to appear in person. This order has been questioned before us.

2. On 30th January 2019 because of earlier notings, the office was directed to find out whether the appellant was allowed to appear in person and to place the report of committee for perusal of the Court. The committee of Registrar (Judicial-I) and Registrar (Judicial-II) considered the issue as per provisions of Chapter-XLIII-A of Bombay High Court Original Side Rules and felt that her appearing in person would be detrimental to her own interests. The committee opined that the appellant should either obtain legal aid or an amicus curiae be appointed. The matter was then taken up on 6th February 2019 and after perusal of the report and after hearing the appellant for some time, we adjourned the matter to enable her to obtain legal advise. On 20th February 2019 as respondent nos.1 to 3 gave no objection, we condoned delay in filing the appeal. The delay was condoned without prejudice to their objection to the maintainability of appeal. On 25th March 2019 respondent nos.1 to 3 pointed out why appeal is not maintainable. They also submitted that the impugned order has been acquiesced into and acted upon and therefore the challenge has become infructuous. After arguments of these respondents, the appellant was heard for some time and then we adjourned the matter to enable her to understand the nature of objections raised. In that order we also pointed out the report submitted by registry. On 1st April 2019 again the matter was heard for some time when respondents also heavily relied upon the judgment of Hon'ble Supreme Court in **Shah Babulal Khimji Vs. Jayaben D. Kania**¹. The affidavit tendered by the appellant was taken on record and thereafter we also pointed out that the order passed by this Court may operate as res-judicata. We, therefore, gave the appellant one more opportunity.

1 AIR-1981-SC-4786

3. Today the applicant has submitted that she never voluntarily opted for services of an advocate and constrained by circumstances during Court hearing, she was forced to avail those services. She further adds that advocates under guise of helping her, have in fact caused prejudice to her case. She submits that as right to property and fundamental rights under Part-III of Constitution of India are at stake, Articles 226 and 227 of Constitution of India permit her to approach this Court in present appeal. She also submits that Order XLIII, Rule 1 of Code of Civil Procedure, 1908 also does not prohibit filing of such an appeal.

4. She has handed over to the Court photocopy of the judgment in case of Shah Babulal Khimji (supra) and from head note submitted that Hon'ble Supreme Court has in effect turned down the finding of Division Bench of this Court holding the appeal to be not maintainable. She, therefore, claims that said judgment is in her favour.

5. We have inquired as to how an appeal can be presented to this Court under Articles 226 and 227 of Constitution of India. The question has not been answered. The submission that judgment of Hon'ble Supreme Court is in favour of present appellant has not been substantiated. On the contrary, learned counsel for respondents have urged that the impugned order does not have any trappings of finality and lis between the parties remains open. This submission is recorded by us in opening paragraph of order dated 1st April 2019.

6. The rules framed by this Court for appearance of parties in person are not in dispute and on more than one occasion the registry has reiterated that the appellant is not in position to take care of her

own interests. After hearing the appellant on two or three occasions, this Court also noticed the same. We, therefore, gave adjournments to enable her to obtain legal advise and to see that the cause, if any, does not receive a permanent set back.

7. As we find that the impugned order dated 11th October 2018 does not in any way adjudicate the lis between the parties, it is apparent that present appeal before this Court is not maintainable. It is accordingly rejected.

8. Needless to mention that it is open to the appellant to take recourse to such other remedies as are available under law.

(PRAKASH D. NAIK, J.)

(B.P.DHARMADHIKARI, J.)

MST