

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CIVIL APPLICATION (O) NO.478 OF 2020

WITH

FAMILY COURT APPEAL (FCA) NO.32 OF 2019

DR. PURNESHWAR PUND S/O MOHANRAO PUND

..VERSUS..

SUSHMA PURNESHWAR PUND

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders.*

Court's or Judge's order

Petitioner in person

Shri. P. S. Patil, Advocate for the Respondent.

CORAM : A. S. CHANDURKAR AND N. B. SURYAWANSHI, JJ.

DATED : 24th NOVEMBER, 2020.

The appellant appeared in person while the learned counsel for the respondent appeared through video conferencing.

This application for grant of early hearing has been filed by the appellant praying that FCA No.32 of 2019 be decided expeditiously. With the consent of appellant and counsel for the respondent, the appeal is taken up for hearing.

The appellant who was married with the respondent on 24.05.2016 filed Petition No.A-234 of 2015 seeking divorce under Section 13 of the Hindu Marriage Act, 1955 (for short, 'the said Act'). In the said proceedings, the respondent filed a counter claim with a prayer for restitution of conjugal rights under Section 9 of the said Act. During the pendency of the proceedings before the Family Court an interim application for payment of maintenance *pendente lite* was moved by the respondent. The same came to be allowed by

the Family Court on 21.09.2016 by passing an order below Exhibit 14. By that order, the appellant was directed to pay sum of Rs.25,000/- per month to the respondent from 06.02.2016 till final adjudication of the proceedings. The appellant challenged the aforesaid order dated 21.09.2016 by approaching the Hon'ble Supreme Court in SLP No.6521 of 2019. On 16.04.2019, the Hon'ble Supreme Court permitted the appellant to withdraw the special leave petition with liberty to approach this Court. The present appeal under Section 19 of the Family Courts Act, 1984 has been filed on 03.05.2019. In this appeal, challenge has been raised only to the order dated 18.01.2018 passed by the Family Court below Exhibit 28. By that order, the application moved by the respondent for dismissal of the divorce petition under provisions of Order 39 Rule 11 of the Code of Civil Procedure, 1908 (for short, 'the Code') came to be allowed. Consequently, the petition filed by the appellant seeking divorce came to be dismissed. Thereafter, the Family Court considered the counter claim of the respondent wherein a prayer for restitution of conjugal rights was made. On 26.11.2018, the learned Judge of the Family Court dismissed the said counter claim.

Shri. P. S. Patil, learned counsel for the respondent submits that the respondent has not challenged the rejection of the counter claim that was filed by the respondent seeking restitution of conjugal rights. As a consequence what remains for consideration is only the challenge to the order dated 18.01.2018 that was passed by the Family Court below Exhibit 28.

In view of the aforesaid facts, the following point arises for consideration :-

Whether the Family Court was justified in dismissing the petition for divorce under provisions of Order 39 Rule 11 of the Code of Civil Procedure ?

We have heard the appellant in person as well as the learned counsel for the respondent. We have also perused the records of the case. As stated above on 21.09.2016, the Family Court directed the appellant to pay an amount of Rs.25,000/- per month as interim maintenance. The interim maintenance was to be paid from 06.02.2016 till final adjudication of the proceedings. As the appellant was in arrears, an application below exhibit 28 was moved by the respondent on 24.08.2017 praying that the divorce petition be dismissed as the appellant had not complied with the order passed below Exhibit 14. Though the say of the appellant was called, he failed to file the same. The learned Judge of the Family Court, therefore, on 18.01.2018 proceeded to invoke the provisions of Order 39 Rule 11 of the Code and as a consequence allowed the application below Exhibit 28 resulting in dismissal of the divorce petition. The record indicates that thereafter the respondent had filed execution proceedings bearing RD No.4 of 2019. In those proceedings, an amount of Rs. 7,77,000/- towards arrears of maintenance at the rate of Rs.25,000/- per month was claimed for the period from 06.02.2016 to 26.11.2018. The appellant deposited the entire amount of arrears in those proceedings which fact was accepted by the respondent. The execution proceedings were therefore disposed of as being fully satisfied by virtue of order dated 14.06.2019. This indicates that the respondent has received the entire amount of arrears from 06.11.2016 to 26.11.2018. As noted above, the petition for divorce filed by the appellant was dismissed on 18.01.2018.

The dispute between the parties being a matrimonial dispute its adjudication on merits is warranted so as to determine the marital status of the parties. Insofar as the prayer for grant of divorce is concerned there has been no adjudication on merits in view of dismissal of the said proceedings under Order 39 Rule 11 of the Code. Though the Family Court was justified in passing the order below Exhibit 28 on 18.01.2018, in the light of the fact that the entire arrears as directed by the Family Court by its order below Exhibit 14 have been now cleared, we are of the view that an opportunity deserves to be given to the appellant to contest the proceedings on merits. The power to restore the proceedings is conferred on the Court under provisions of Order 39 Rule 11(2) of the Code. Considering the nature of dispute between the parties we are inclined to restore the proceedings for divorce to enable the appellant to ventilate all his grievances which would also give an opportunity to the respondent to contest the same. Accordingly, the point as framed is answered by holding that though the Family Court was justified in passing the order below Exhibit 28 on 18.01.2018 by virtue of provisions of Order 39 Rule 11(2) of the Code, the said proceedings are liable to be restored.

Hence, for the aforesaid reasons, the following order is passed :-

- i) The order passed by the Family Court below Exhibit 28 on 18.01.2018 is set aside.
- ii) The petition for divorce bearing Petition No.A-234 of 2015 is restored for fresh adjudication on merits before the Family Court Amravati. On restoration of the proceedings, the respondent is at liberty to seek interim maintenance and the appellant is permitted to raise all permissible defences available to him.

iii) The Family Court shall after giving due opportunity to the parties, decide the said proceedings expeditiously and on its own merits within a period of six months from the date of appearance of the parties before it. The parties shall appear before the Family Court Amravati on 07.12.2020. The records and proceedings be sent to the Family Court Amravati forthwith.

Needless to state that the adjudication on the counter claim filed by the respondent has attained finality and the same shall not be re-opened. It is clarified that all the questions on merits are kept open for being decided by the Family Court in the divorce proceedings. The Family Court Appeal is accordingly allowed in aforesaid terms. The Civil Application also stands disposed of. The parties shall bear their own costs.

(N. B. SURYAWANSHI, J.)

(A. S. CHANDURKAR, J.)

APTE/TAMBE