

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**35 SECOND APPEAL NO.573 OF 2013
WITH CA/11857/2013 IN SA/573/2013**

DADAJI DAGAJI KHAIRNAR

VERSUS

SAU. VIJAYA W/O DADAJI KHAIRNAR

...

Mr. C.R. Deshpande, Advocate for the appellant

Mr. R.S. Banik, Advocate h/f Mr. V.P. Latange, Advocate for the sole
respondent

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 30th AUGUST, 2021.

ORDER :

1 Heard learned Advocate Mr. C.R. Deshpande for the appellant and learned Advocate Mr. R.S. Banik holding for learned Advocate Mr. V.P. Latange for the sole respondent.

2 Present appeal has been filed by the original defendant challenging the Judgment and Decree passed in Regular Civil Appeal No.26/2010 by learned Adhoc District Judge-1, Dhule, thereby allowing the appeal filed by the original plaintiff on 03.05.2013, thereby reversing the

Judgment and Decree passed by learned 4th Joint Civil Judge Junior Division, Dhule in Regular Civil Suit No.429/2004 dated 28.01.2010 and thereby decreeing that suit. The present respondent-original plaintiff had filed the said suit i.e. Regular Civil Suit No.429/2004 for declaration that the Divorce Deed dated 20.02.1989 is illegal and against customs of the community of the plaintiff and defendant. The said suit was dismissed by the learned Trial Court by holding that the plaintiff has failed to prove that the said Divorce Deed was null, executed from her by coercion. She failed to prove that the divorce being not a customary mode of divorce is null and void. It was held that the suit is not within limitation. The plaintiff challenged the said Judgment and Decree in the said Regular Civil Appeal No.26/2010 and the learned First Appellate Court after re-appreciation of evidence, which was permissible under Section 96 of the Code of Civil Procedure, 1908 held that the plaintiff had proved that the Divorce Deed dated 20.02.1989 got executed from plaintiff was due to coercion caused due to defendant and it is null and void as against the custom. It was held that the suit is within limitation.

3 The learned Advocate appearing for the appellant submitted that the matter deserves to be admitted, as it is raising substantial questions of law. The Courts below are not concurring with the facts as well as on the

point of law. The document of Divorce Deed was admittedly executed by the plaintiff on 20.02.1989. So also, the learned First Appellate Court failed to consider that plaintiff herself had filed application for maintenance under Section 125 of the Code of Criminal Procedure, 1973, vide Criminal Miscellaneous Application No.8/1991, for getting maintenance to herself and her son. The said application came to be dismissed as against the plaintiff, but then monthly maintenance @ Rs.250/- was granted to her son. The said Judgment was confirmed by the Sessions Judge. Plaintiff had then approached to this Court by filing Writ Petition No.265 of 1996. The High Court has restored the Criminal Miscellaneous Application No.8/1991, for fresh hearing, in connection with the plaintiff, as regards her right to claim maintenance. Therefore, when she had the knowledge about the execution of the document, her suit filed on 03.12.2004 cannot be said to be within limitation. Reliance has been placed on the decision in **Satyabhamabai (deceased by LR) and etc. vs. Pandurang Marotrao Pawar, AIR 1990 BOMBAY 134**. In this case, execution of deed of relinquishment by illiterate old lady was sought to be cancelled in civil suit. It was contended in the suit for cancellation of the said deed that the thumb impression on deed was obtained by fraud and misrepresentation. However, the evidence that was brought on record showed that plaintiff had the knowledge about the said deed in 1967 during mutation proceedings and, therefore, the suit that was

filed in the year 1978 was held to be barred by limitation. The learned Advocate for the appellant, therefore, submits that the point of limitation being substantial question of law deserves to be framed and for that purpose appeal deserves to be admitted.

4 Learned Advocate for the respondent supported the reasons given by the First Appellate Court and submitted that since the facts and evidence was not considered by the learned Trial Judge properly, the plaintiff was required to file the appeal and the First Appellate Court has considered the facts as well as law properly, it need not be disturbed in the Second Appeal.

5 At the outset, it is to be noted that though it was contended by the plaintiff that the said document is against the custom, it appears that the learned Trial Judge has wrongly put burden on the plaintiff to show that the Divorce Deed is not as per customary mode. The issues should be framed as far as possible in affirmative language and negative burden cannot be put on a party. It appears that both the parties are Hindu and, therefore, the First Appellate Court has rightly relied on the decision in **Rameshchandra Rampratapji Daga vs. Rameshwari Rameshchandra Daga**, (2005) 2 SCC 33, wherein it has been held that, *“Marriage can be dissolved only in accordance with the provisions of the Act by obtaining a decree of divorce from the*

Court. In absence of any decree of dissolution of marriage from the Court, marriage cannot be dissolved". Here, a registered document of dissolution of marriage has been executed, which, according to the plaintiff, it is got executed by coercion. Even if for the sake of argument we presume that there was no such coercion; yet, when there could not have been the legal divorce between them except by a decree, the execution of such document itself was illegal and *void ab initio*. This fact appears to have not been considered by the learned Trial Court. The burden ought to have been on the defendant to prove that there is a custom in his community to take such kind of divorce. He ought to have led positive evidence to prove such customary divorce. But it appears that he has not led that kind of evidence.

6 When we are coming to a conclusion that a marriage cannot be dissolved except by a decree and in case of customary divorce it has to be proved by the propounder thereof, then the document, which was got executed from the plaintiff herein, is *void ab initio*. It was not even necessary that it should have been got cancelled. Though it appears in this case, there is knowledge of execution of that document to the plaintiff and she had filed application for maintenance; yet, her suit cannot be dismissed on the count of limitation, as it can be said that the question was related to a legal character or status of the plaintiff and according to the plaintiff, her marital

tie is still in existence, which she was able to prove and the registration of that document could not have given any status to the defendant. If a document is *void ab initio*, it is void from its inception and, therefore, it can be get so cancelled at any point of time. At the costs of repetition, it can be said that it was not even necessary to get it cancelled because it is *void ab initio*. The appreciation of evidence as well as the legal point involved by the First Appellate Court is proper and legal and, therefore, it is not giving rise to any substantial question of law, as contemplated under Section 100 of the Code of Civil Procedure, 1908. Hence, the Second Appeal stands dismissed. Civil Application No.11857 of 2013 stands disposed of.

(Smt. Vibha Kankanwadi, J.)

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