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

APPEAL FROM ORDER NO. 12 OF 2020
WITH
CIVIL APPLICATION NO. 9236 OF 2019

Pramod s/o Anna Mete
Age 34 years, Occu.Agriculture,
R/o Khed,
Taluka and District Osmanabad ..Appellant

Versus

Shital w/o Pramod Mete,
Age 28 years, Occu. Household,
R/o Bori, Taluka Washi,
District Osmanabad,
At present R/o C/o Chatrabhuj
Gaibi Chavan,
R/o 1964, Shrikrishna Co-op. Society,
Subhash Nagar, Kalyan Road,
Bhivandi, Taluka Bhivandi,
District Thane ..Respondent

Mr Dhananjay A. Naik, Advocate for appellant
Mr Vilas P. Savant, Advocate for respondent

CORAM : SHRIKANT D. KULKARNI, J.

RESERVED ON : 29.07.2021
PRONOUNCED ON : 21.08.2021

JUDGMENT:

1. Heard.

2. Admit. Learned Advocate Mr Vilas P. Savant waives notice of admission on behalf of respondent.

3. With the consent of both sides, this appeal is taken up for final disposal at admission stage.

4. This appeal is directed against the impugned judgment and decree passed by District Judge-1 at Osmanabad in Regular Civil Appeal No.116 of 2017, whereby learned District Judge-1 remanded the matter for fresh decision to the trial Court.

FACTUAL MATRIX

(I) The marriage between the parties was solemnised on 11.7.2013. After the marriage, respondent/wife came to appellant's house for co-habitation. During co-habitation, the appellant noticed abnormal behaviour of his wife and he informed about it to her parents. The parents informed the appellant that their daughter is mentally ill and her medical treatment was going on at Barshi and requested to accommodate her. The appellant took the respondent/wife to Psychiatric Dr. Mahesh Kanade at Osmanabad for treatment. During the treatment, father and other relatives of the respondent/ wife came to appellant's house and took away the respondent with them and since then the respondent/wife is residing with her parents. The appellant and his relatives tried their level best to bring back the respondent for co-habitation, but no fruitful outcome. Due to the mental illness of the respondent, it is not possible for the appellant to co-habit with the respondent. The appellant filed Hindu Marriage Petition No. 27 of 2014 before the Civil Judge, Senior Division at Osmanabad for divorce under Section 13 (1) (ia) (iii) of the Hindu Marriage Act, 1955. The respondent/wife appeared in the petition. Both the parties adduced their oral and documentary piece of evidence. The learned Joint Civil Judge, Senior Division, Osmanabad was pleased to allow the petition on 29.08.2015 and dissolved the wedlock between the parties.

(II) The respondent/wife challenged the said judgment and decree of divorce before the learned District Judge at Osmanabad by filing Regular Civil Appeal No. 150 of 2015. The learned District Judge-3, Osmanabad, by its judgment dated 26.02.2016 remanded the petition to the trial Court without going through the evidence and merits of the case. The remand was

simply on technical ground that appellant has not complied with the provisions of Section 24 of the Hindu Marriage Act, 1955.

(III) Accordingly, both the parties appeared before the trial Court in original proceedings, i.e. Hindu Marriage Petition No. 27 of 2014. After remand of the petition, the respondent/wife did not adduce anymore evidence in spite of giving sufficient opportunities by the trial Court. The learned trial Judge, after perusing the evidence on record, by its judgment and decree dated 27.7.2017 again allowed the petition and dissolved the marriage between the parties.

(IV) Respondent/wife again challenged the said decision by filing Regular Civil Appeal No. 116 of 2017 with contention that the trial Court has not considered the evidence on record and recorded incorrect findings. The learned District Judge-1, Osmanabad allowed the Regular Civil Appeal No.116 of 2017 and again remanded the petition for divorce to the trial Court for fresh decision.

(V) Feeling aggrieved and dissatisfied by the impugned judgment and decree dated 28.2.2019, passed by District Judge-1 at Osmanabad in Regular Civil Appeal No.116 of 2017, the appellant has knocked the doors of this Court and challenged the judgment and decree on various grounds.

5. Heard Mr Dhananjay A. Naik, learned Advocate for the appellant/husband and Mr Vilas P. Savant, learned Advocate for respondent/ wife at length. Perused the following documents :

(i) Copy of H.M.P.No. 27/2014;

(ii) Copy of W.S. filed by the respondent;

(iii) Copy of judgment dated 29.8.2015 passed by the Civil Judge, Senior Division, Osmanabad in H.M.P. No.27/2014;

(iv) Copy of Judgment dated 26.2.2016 passed in R.C.A.No.150/2015

(v) Copy of order dated 21.2.2017 passed by this Court in M.C.A.No.87/2016;

(vi) Copy of receipt dated 8.7.2016;

(vii) Copy of receipt dated 18.3.2017;

(viii) Copy of judgment and decree dated 27.7.2017 passed in H.M.P. No.27/2014;

(ix) Copy of R.C.A.No. 116/2017;

(x) Copy of judgment and decree dated 28.2.2019 passed by District Judge-1, Osmanabad in R.C.A.No.116/2017;

(xi) Copy of application below Exh.96, along with reply filed by the present appellant and order dated 11.07.2017 passed by the Trial Court.

6. According to Mr Dhananjay Naik, learned Advocate for the appellant, the learned District Judge at Osmanabad has remanded the matter to the trial Court, for fresh decision on second occasion without considering the conduct of the respondent/wife. The respondent/wife did not respond to lead the evidence in spite of giving sufficient opportunities by the trial Court. The learned trial Judge was pleased to reject the application moved by the respondent/wife vide Exh.96 by noticing the conduct of the respondent/wife. The order dated 11.7.2017 passed by the learned 3rd Joint Civil Judge, Senior Division, Osmanabad has remained unchallenged. Mr Naik submitted

that the trial Court ought to have decided the matter on its own merits instead of remanding the same to the trial Court. He submitted that the appellant/husband is fighting this litigation for getting divorce since the year 2014. The learned District Judge has not considered this aspect and second time remanded the matter to the trial Court for fresh decision. The impugned judgment passed by the learned District Judge is erroneous and against the principles of law and justice. The learned District Judge has not considered the important aspect that respondent/wife had intentionally avoided to lead the evidence. The finding recorded by the learned District Judge that the appellant had conceded to remand the matter is perverse. The record speaks otherwise. The copy of the purshis on record nowhere shows signature of the appellant or his Advocate. As such, the finding of the learned District Judge that both the parties have given consent for remanding the matter to the trial Court is improper and incorrect.

7. Per contra, Mr Vilas P. Savant, learned Advocate for respondent/wife strenuously argued that no sufficient opportunity was given to the respondent/wife to lead her evidence. The learned District Judge has considered this aspect and accordingly, remanded the matter to the trial Court for fresh decision by giving an opportunity to the respondent/wife to lead her evidence. It is a matrimonial dispute between the parties and the wife should get sufficient opportunity to defend her case. The appellant/husband has put forth the ground of mental illness of his wife for divorce and, therefore, the evidence of wife/Respondent and evidence of Doctor is important. Mr Savant supported the impugned judgment passed by the learned District Judge-1 at Osmanabad.

8. I have considered the submissions advanced by the learned Advocates for both the sides.

9. The powers of the appellate Court under Order XLI Rule 23, 23-A and 25 of the C.P.C. speak itself. The law is well settled on the powers of the appellate Court to remand the matter under certain circumstances. In case of **Syeda Rahimunnisa Vs. Malan Bi (Dead) by L.Rs. and anr.,** reported in **2016 AIR (SC) 4653,** it is held by the Hon'ble Supreme Court in para 35 as under :

> "35. It is a settled principle of law that in order to claim remand of the case to the trial court, it is necessary for the appellant to first raise such plea and then make out a case of remand on facts. The power of the appellate court to remand the case to subordinate court is contained in order XLI Rule 23, 23-A and 25 of CPC. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand. The appellate court is required to record reasons as to why it has taken recourse to any one out of the three Rules of Order XLI of CPC for remanding the case to the trial court. In the absence of any ground taken by the respondents (appellants before the first appellate court and High Court) before the first appellate court and the High Court as to why the remand order in these cases is called for and if so under which Rule of Order XLI of CPC and further in the absence of any finding, there was no justification on the part of the High Court to remand the case to the trial court."

10. Now coming to the first point raised by Mr Naik, learned Advocate for the appellant, the remand of petition to the trial Court without consent of appellant or his Advocate. Mr Naik has invited my attention to the photocopy of the purshis moved by the respondent/wife before the District Judge at Osmanabad in Regular Civil Appeal No.116 of 2017. On going through the

purshis, it is evident that the said purshis only bears signature of respondent/ wife (Appellant in R.C.A.No.116/2017). It does not bear signature of husband or his Advocate. It is difficult to gather from the purshis itself that the husband or his Advocate had given consent to remand the matter to the trial Court. On perusing the impugned judgment passed by District Judge-1 at Osmanabad dated 28.02.2019, more particularly, the observations made in para 19 regarding remand of the matter to the trial Court with the consent of both the sides appear to be factually incorrect. I found merit in the submissions of learned Advocate Mr Naik for the appellant/husband. Without consent of appellant or his Advocate, proceedings of Hindu Marriage Petition No. 27 of 2014 seems to have been remanded to the trial Court, which has caused injustice to the appellant/husband.

11. Now coming to other aspects. The factual compass speaks that learned District Judge-3, Osmanabad remanded the matter vide its judgment and order dated 26.2.2016 in Regular Civil Appeal No.150 of 2015. The same District Judge while occupying post of District Judge-1 at Osmanabad has remanded the proceedings of Hindu Marriage Petition No.27 of 2014 to the trial Court again by passing some strictures against the trial Judge, which appear to be unwarranted. The record itself speaks that the learned trial Judge has given sufficient opportunities to the respondent/wife to lead her evidence, but there was no response from the side of wife and ultimately, the learned trial Judge was pleased to pass an order vide Exh.96 and proceeded with the matter. The order passed below Exh.96 dated 11.7.2017 itself speaks about the conduct of the respondent/wife as to how she has delayed the proceedings. The respondent/wife should be blamed for such delay and not the appellant/husband.

12. Be that as it may, it is a marital dispute between the parties. The appellant/husband is seeking divorce under Section 13 (1) (ia) (iii) of the Hindu Marriage Act, 1955 on the ground of mental illness of his wife/respondent. By looking to the ground for divorce, the learned District Judge-1 ought to have given an opportunity to the respondent/wife to lead her evidence before itself instead of remanding the matter to the trial Court. The Doctor's evidence is important. The District Judge should have recorded the evidence of Doctor and wife, if necessary instead of repeating exercise of remanding the matter to the trial Court.

13. Having regard to the above reasons and discussion and in order to give one more opportunity to the parties and in the interest of justice, I am of the view that it would be proper exercise, if the learned District Judge is directed to record the evidence of both the sides, including Doctor and decide the matter itself instead of remanding the proceedings of Hindu Marriage Petition to the trial Court again. The District Judge being the first appellate authority and last fact finding Court may decide the marital dispute between the parties having regard to the facts of the case and evidence on record, which would meet the ends of justice.

ORDER

(i) The appeal stands allowed.

(ii) The impugned judgment and decree passed in Regular Civil Appeal No. 116 of 2017 by the District Judge-1, Osmanabad dated 28.2.2019 is hereby quashed and set aside.

(iii) The proceedings of Regular Civil Appeal No.116 of 2017 is hereby restored to the file of District Judge-1, Osmanabad.

(iv) The learned District Judge-1, Osmanabad is requested to extend an opportunity to both the parties to lead their oral and documentary evidence including medical evidence and decide the proceedings of Regular Civil Appeal No.116 of 2017 afresh involving subject of divorce on its own merits within six months from the date of appearance of the parties.

(v) The parties shall appear before the learned District Judge-1 at Osmanabad on 1.9.2021. The learned District Judge-1, Osmanabad is requested to fix schedule for recording of evidence by taking into consideration the convenience of both the sides and accordingly proceed with the appeal.

(vi) Respondent/wife to put on caution that no adjournment shall be granted on flimsy grounds.

(vii) Civil Application No.9236 of 2019 stands disposed of.

(viii) The Registry to communicate this order to concerned Court for information and compliance.

(ix) Appeal from Order is accordingly disposed of.

(SHRIKANT D. KULKARNI)
JUDGE

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