

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

909 FAMILY COURT APPEAL NO.72 OF 2018

VAISHALI JAYWARDHAN BHALE
VERSUS
JAYWARDHAN BHUJANG BHALE

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Advocate for Appellant : Mr. Syed G. R.

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**CORAM : RAVINDRA V. GHUGE, AND
S. G. MEHARE, JJ.**

DATE : 13.10.2021

PER COURT :-

1. By this appeal, the appellant seeks to assail the judgment dated 18.08.2018 delivered by the learned Family Court, Nanded dismissing Petition No.A-156 of 2017 filed by the appellant-wife seeking a divorce under Section 13(1)(i)(b) of the Hindu Marriage Act on the ground of desertion.

2. The respondent-husband, who is a legal practitioner as like the appellant (who is presently a Judicial Officer in the State District Judiciary), did not participate in the proceedings before the Family Court and the said proceedings were decided *ex-parte*.

3. Even before this Court, notice was issued on 28.11.2018. By order dated 09.01.2019, additional notice by R.P.A.D. was allowed and *Humdast* was granted. Office note indicates that the respondent was not served till 05.12.2019. This Court, therefore, re-issued notice on 06.12.2019 and granted *Humdast*. In the meanwhile, record and proceedings were received. As notice was not served, again a notice was issued on 12.02.2020 mentioning that the non-appearance of the respondent will be construed as the respondent concedes to this appeal. By office report dated 17.06.2020, it is apparent that the respondent has been served with the notice for final disposal. Yet no appearance has been entered. A last chance was granted to the respondent by order dated 01.12.2020. Yet, the respondent is absent.

4. The petitioner has placed before the Court an agreement by which both the parties agreed to take a customary divorce by mutual consent, vide the said agreement dated 07.07.2014. A second deed was issued by both the parties on the same date, thereby recalling the earlier deed and agreeing to a mutual divorce.

5. The learned advocate for the appellant-wife submits on instructions that the respondent, after opting for a customary divorce on 07.07.2014, has re-married and also has a child.

6. The ground of customary divorce was not taken by the appellant before the Family Court. Civil Application No.5671 of 2021 was filed before us for seeking leave to amend the basic pleadings before the Family Court as well as in the appeal before us. The notice to the respondent was published in Marathi Dainik "Ekmat", Udgir Edition on 27.08.2021 in the light of the earlier order of this Court dated 20.08.2021. We have permitted the petitioner to get notice published in Marathi Dainik "Ekmat", Udgir Edition. Yet, the respondent has not appeared before the Court, either in person or through an advocate.

7. It *prima facie* appears to us that the appellant was not properly advised to draw legal assistance from the two affidavits placed before us. They retracted the customary divorce by the document at page No.13 dated 07.07.2014 and by nullifying the customary divorce vide the affidavit sworn on

the same date 07.07.2014 at page No.8, they agreed for a mutual divorce. These developments have taken place prior to the delivery of the impugned judgment dated 18.08.2018. This should have been placed before the Family Court before it delivered the impugned judgment.

8. By our orders dated 20.08.2021 and 16.09.2021 delivered in Civil Application No.5671 of 2021, we have permitted the appellant to amend the appeal as well as her basic pleadings before the Family Court for introducing the contentions based on the said two affidavits dated 07.07.2014. As these aspects were not brought to the notice of the learned Family Court, it had no occasion to deal with the same.

9. In view of the above, this appeal is partly allowed. The impugned judgment dated 18.08.2018 is quashed and set aside and petition No.A-156 of 2017 is restored to the file of the learned Family Court at Nanded on the following conditions :

- (a) The learned Family Court shall now issue fresh notices to both the parties.
- (b) The amended petition, having regard to the grounds

set out in view of the orders of this Court, shall be considered by the learned Family Court, Nanded while deciding petition No.A-156 of 2017, afresh.

(c) The aspect of mutual divorce by virtue of the affidavit referred to above and the fact that the appellant is residing separately for the last 7 years, would also be taken into account.

(d) The Record and Proceedings shall be returned forthwith to the learned Family Court, Nanded in Petition No.A-156 of 2017.

(S. G. MEHARE, J.)

(RAVINDRA V. GHUGE, J.)

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vmk/-