

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

FAMILY COURT APPEAL NO. 31 OF 2019

Sau.Sheweta w/o Shashank Joshi,
Aged about 30 years, Occupation : Household,
R/o. C/o. Subhash Chhotelaji Sharma,
Sharad Nagar, Shivar, Akola.
Tah. and District Akola..

... Appellant.

-vs-

Shashank s/o Suresh Joshi,
Aged about 38 years, Occupation : Lecturer,
R/o. S.B.Joshi, Near Sharma Floor Mill,
Balode Layout, Hingna Road, Akola.
Tahsil and district Akola.

..Respondent

Shri O.Y.Kashid, Advocate for appellant.
Shri A.J.Thakkar, Advocate for respondent.

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

DATED : 29th January, 2021.

Oral Judgment : (Per A.S.Chandurkar, J.)

The challenge raised in this appeal is to the judgment of the Family Court, Akola, in A Petition No. 27/2017 dated 26.04.2018.

2. The appellant and the respondent were married on 29.04.2015. After their marriage they resided together for some period after which the relations between them got strained. On 07.02.2017 the respondent-husband filed petition under Section 11 read with Section 5 of the Hindu Marriage Act, 1955 seeking a declaration that his marriage with the appellant-wife was null and void in view of the fact when they were

married on 29.04.2015, the wife had a spouse living due to her earlier marriage dated 24.06.2007. Besides this ground, it was also pleaded that the wife was treating the husband with cruelty.

3. In the written statement filed by the wife it was vaguely denied that she had married earlier and that her spouse from her earlier marriage was living. The parties led evidence before the Family Court and after considering the same, the learned Judge of the Family Court recorded a finding that the husband had proved that when he had married the appellant on 29.04.2015 her husband from the earlier marriage was living. On that count the marriage was declared to be null and void. Being aggrieved the wife has challenged the said judgment.

4. Shri O.Y.Kashid, learned counsel for the appellant-wife submitted that even though the wife had contracted marriage on 24.06.2007, she had separated from her husband by virtue of obtaining customary divorce. Referring to the divorce deed at Exhibit 24 dated 12.07.2010 it was submitted that by virtue of this customary divorce, it could not be said that when the appellant married the respondent she had a spouse living. It was his contention that the wife had specifically deposed about obtaining of customary divorce and there was no specific cross-examination of the wife on that aspect. Moreover when the divorce deed was exhibited the same was not objected to by the husband. It was

further submitted that in the proceedings under the Protection of Women from Domestic Violence Act, 2005, the husband had taken a stand that the appellant was his legally wedded wife. In view of these contentions it was submitted that the judgment of the Family Court was liable to be set aside.

5. On the other hand, Shri A.J.Thakkar, learned counsel for the respondent-husband supported the impugned judgment. He submitted that the wife having pleaded the aspect of customary divorce the burden was on her to prove the same. In the cross-examination it was specifically admitted by the wife that all divorces in their community took place by way of decree of the Court. Placing reliance on the decisions in *M.M.Malhotra Vs. Union of India and ors AIR 2006 SC 80*, *Shalini Dhanraj Shirsat Vs. Dhanraj Tukaram Shirsat 2017(3) All M R 735* and *Mangala Bhivaji Lad Vs. Dhondiba Rambhau Aher 2010 (4) Mh L J 486* it was submitted that in absence of customary divorce being proved by the wife, that defence was not liable to be accepted. He therefore submitted that there was no reason to interfere with the impugned judgment.

6. In the light of the aforesaid discussion, the following point arises for adjudication :

Whether the appellant has proved that the judgment of the Family Court holding her marriage to be null and void is not in accordance with law ?

7. We have heard the learned counsel for the parties at length and we have perused the documents on record. In the divorce petition it was the specific case of the husband that his wife had earlier married one Vinod Jayprakash Pande and this marriage had not been dissolved by decree of the Court. The wife in her deposition at Exhibit 21 stated that her earlier marriage came to an end by virtue of the document of divorce. She placed the divorce deed on record which was marked as Exhibit 24. In that document it has been stated that as per the custom prevailing in her community the divorce was obtained. In the cross-examination of the wife it was admitted that her earlier marriage had not been dissolved by any decree of the Court and that it was true to say that all divorces in her community took place by way of a decree of the Court.

8. It is thus seen that while the earlier marriage of the wife has been admitted her, she sought to rely upon the divorce deed at Exhibit 24 for taking the stand that she had obtained customary divorce from her earlier husband. There is however neither any pleading nor any evidence to indicate that customary divorce was prevailing in her community and that the marriage between the wife and her earlier husband was dissolved by virtue of such customary divorce. Merely because the divorce deed dated 12.07.2010 was exhibited as Exhibit 24 that would not mean that the aspect of customary divorce stood proved. Mere exhibition of such

document would not amount to proof of the contents thereof. Hence the wife cannot contend that merely because the divorce deed was exhibited, the customary divorce was duly proved. The burden to prove the same was on the wife but she failed to prove the same. The learned Judge of the Family Court has appreciated the aforesaid evidence in a proper manner and we do not find any reason to take a different view. The decisions relied upon by the learned counsel for the husband in *M.M.Malhotra, Shalini Dhanraj Shirsat and Mangala Bhivaji Lad* (supra) support his contentions. In that view of the matter the point as framed is answered by holding that the Family Court has rightly held the marriage between the parties to be null and void.

9. In the light of aforesaid discussion, the judgment dated 26.04.2018 in A-Petition No.27/2017 passed by the learned Judge of the Family Court, Akola is confirmed. Family Court Appeal No.31/2019 stands dismissed leaving the parties to bear their own costs.

JUDGE

JUDGE

Andurkar..