

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

**FAMILY COURT APPEAL NO.67 OF 2022
WITH
CA/13050/2022 IN FCA/67/2022**

Kavita Piraji Kharat,
correct name Kavita w/o Gulab Kamble,
Age : 28 years, Occu : Household,
R/o : Chattrapati Colony,
Tq. and Dist. Jalna.

... **APPELLANT**

VERSUS

Gulab Narayan Kamble
Age : 30 years, occu: Labour
R/o. Chattrapati Colony,
Tq. and Dist. Jalna.

... **RESPONDENT**

...

Ms. Maya R. Jamdhade, advocate for appellant

...

**CORAM : MANGESH S. PATIL &
SANDEEP V. MARNE, JJ.**

DATE : 22.09.2022

ORDER (MANGESH S. PATIL, J.) :

Heard the learned advocate Ms. Jamdhade for the appellant. The appellant is impugning the common judgment and order passed by the Family Court in a petition filed by the respondent seeking a declaration regarding nullity of the marriage between the appellant and him under Section 11 of the Hindu Marriage Act, 1955 (herein after the Act) on the ground that she was having spouse living at the time of marriage, and in her petition filed under Section 125 of the Code of Criminal Procedure, whereby the Family Court allowed the respondent's petition and dismissed her's.

2. It transpires during the course of argument and after going through the judgment that in addition the respondent was also seeking nullity of the marriage under Section 12 of the Act on the ground that his consent for the marriage was obtained by fraud, falsely pretending that the appellant had dissolved her first marriage. However, the Family Court, in our considered view has rightly discarded that ground of voidability of the marriage on the ground of fraud.

3. Learned advocate Ms. Jamdhade would vehemently submit that the Family Court has miserably erred in appreciating the rival stand and the evidence. The judgment is perverse and arbitrary. There was evidence to demonstrate that the petitioner's first marriage was legally dissolved. Even the Family Court had rightly discarded respondent's stand of his consent for the marriage having been obtained by fraud. Admittedly, both had solemnized marriage and had lived together as husband and wife for few years. Even she had become pregnant but had to undergo an abortion. Her first husband who was near relative was also examined as a witness. A deed of dissolution of marriage which was notarized was also produced on record. It was a customary divorce which is recognized by law as is laid down in the matter of **Yamanaji H. Jadhav Vs. Nirmala; (2002) 2 SCC 637**.

4. We have carefully considered the submission of the learned advocate and perused the record.

5. Admittedly, the couple had solemnized the marriage in Aarya Samaj regarding which a witness was also examined. There was also

evidence in respect of the forms filled in by both of them independently in their own hands and were submitted in the Aarya Samaj. Those were duly proved and exhibited, wherein, the appellant had disclosed about her first marriage and had also disclosed that it was dissolved. Incidentally the respondent examined her first husband Siddharth as his witness. Interestingly, during his cross-examination on behalf of the appellant, even suggestion was put to him that he had never married to her which he flatly denied. He specifically stated about the marriage having been solemnized between them in the year 2009. They stayed together for one to two months and thereafter got separated and a deed was notarized by styling it as 'Divorce Deed'. In spite of having taken such a stand, the learned advocate for the appellant for the first time is raising new ground before us, regarding which there is no foundation in the pleading of the appellant and even no evidence was laid before the Family Court regarding legality of customary divorce. She tried to salvage some ground by submitting that it was a customary divorce between the appellant and her first husband which is recognized by law.

6. There cannot be dispute about the legal position that there could be a customary divorce as well, as has been laid down under Section 29(2) of the Act. However, this is a completely new stand by the appellant. Even the learned advocate for the appellant fairly conceded the fact that no such pleading was made and even no evidence was led to prove such a custom.

7. As a last resort even the learned advocate makes feeble attempt and request that the matter may be remanded to enable the appellant to prove such custom.

8. There are no pleadings and even there is no specific request in the appeal memo for remand of the matter. This apart, as is mentioned herein above, during cross-examination of her first husband Siddharth, suggestion was put by her that no marriage was solemnized between them. If this is so, permitting the appellant to now take a contrary stand would be impermissible and illegal.

9. In view of such state of affairs, when the fact of first marriage of the appellant has been duly proved and there is no evidence about it having been dissolved, the marriage between the appellant and the respondent was not legally permissible in view of Section 5(i) of the Act.

10. As a logical and legal corollary, not being the wife of the respondent, the appellant is also not entitled to claim maintenance under Section 125 of the Code of Criminal Procedure.

11. Learned Judge of the Family Court has correctly appreciated the evidence and has rightly passed the impugned judgment and order. We find no sufficient and cogent reason to cause any interference. The Appeal is dismissed *in limine*.

12. Pending civil application is disposed of.

(SANDEEP V. MARNE, J.)

(MANGESH S. PATIL, J.)