

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

934 WRIT PETITION NO.10788 OF 2021

**SOMNATH GANGADHAR MUNGSE
VERSUS
ARUNA SOMNATH MUNGSE**

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Advocate for Petitioner : Mr. D.R. Adhav
Advocate for Respondent sole : Mr. R.R. Bangar

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CORAM : SMT. BHARATI H. DANGRE, J.
DATED : 23/02/2022

PER COURT :

1. Heard the learned counsel for petitioner/husband and the learned counsel for respondent/wife. The petition is filed being aggrieved by the impugned order passed by the learned Jt. Civil Judge, Senior Division, Ahmednagar when the application filed by the petitioner, who is judgment debtor, for rejection of Darkhast came to be rejected.

The sequence of events would reveal that the respondent/wife filed H.M.P No.554/2013 in the Court of Civil Judge, Senior Division, Ahmednagar under section 13 (ia) (ib) of Hindu Marriage Act seeking annulment of marriage. During the pendency of the said petition the parties had arrived at compromise which were tendered before the Court vide Exh. 17 and it bear the signature of the

petitioner/ husband and the respondent/wife along with the respective counsel. The compromise recorded was to the following effect :-

- (i) The respondent/husband shall not indulge in any maltreatment to the wife or to the children.
- (ii) The respondent/husband shall pay an amount of Rs.5,000/- towards the maintenance of wife, her two sons Pratik and Kartik.
- (iii) The respondent/husband shall take care of his children and his wife.
- (iv) The respondent/husband shall not physically or mentally harass the applicant/wife.

These compromise terms were placed before the Court vide Exh. 17. After two years, a pursis came to be filed and to be precise on 28.1.2016 signed by the advocates of the husband and the wife where she informed the Court that the discord between the parties is over and she is residing with opposite party i.e. husband and therefore, she do not want to prosecute the marriage petition.

There is no reference to the compromise which was entered into between the parties vide Exh. 17 and on this pursis filed vide Exh. 28, Civil Judge, Senior Division, Ahmednagar, passed the following order :-

“The petitioner is moved pursis vide Exh. 28 for withdrawal of petition. Hence the petition stands disposed of as withdrawn.”

Hindu Marriage Petition filed by the wife was therefore disposed of as withdrawn.

2. This order is sought to be executed by filing execution proceeding vide Regular Darkhast No. 173/2017 and pertinent to note that this application is filed under section 47 r/w. Section 151 of Code of Civil Procedure. The application is opposed by the judgment debtor on the ground that there is no decree in existence which is put for execution and infact the compromise which was arrived between the parties is not the ground by which the wife sought withdrawal of the petition, but after almost of two years she moved a pursis under her own signature stating that she is residing with her husband and therefore, she want to withdraw the petition. The marriage petition was, therefore, disposed of as withdrawn.

3. There is no adjudication by the learned Judge on merits and pertinent to note that in order to fall within the purview of ‘decree’ which is defined under section 2 (2), the decree is formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with

regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include any adjudication from which an appeal lies as an appeal from an order or any order of dismissal for default. The application for execution of the decree, which is filed by invoking section 47, per-supposes existence of decree. In this particular case, the learned counsel for respondent vehemently submits that in the wake of compromise that was arrived at between the parties vide Exh. 17, she sought withdrawal of the proceedings.

This do not appear to be correct position emerging from the record. The compromise pursis is signed by the parties on 23.6.2014 and when the application is moved for withdrawal of the proceedings vide Exh. 28, there is no reference of the compromise. The withdrawal of the petition sought on the ground of amicable settlement, they have put an end to dispute and husband and wife are residing together. There is no adjudication of the claim in the marriage petition filed by the wife and therefore, the same could not fall within the meaning of 'decree' as defined under section 2(2) of Code of Civil Procedure. Necessarily there cannot be any execution of the said order withdrawing the marriage petition.

The learned Judge has rejected the objection raised by the petitioner/judgment debtor by relying upon the decision of the Apex Court in para 12. Reading of the decision relied upon would clearly reveal that the Apex Court has specifically held that in absence of a formal decree not being drawn or/and filed, the appellant (decree holder) had no right to file the Execution petition on the strength of the consent order is not correct view. There is a striking distinction between the decision relied upon and the arguments advanced in the present case. In para 42 the Apex Court in case of **Sir Sobha Singh and Sons Pvt. Ltd. Vs. Shashi Mohan Kapur (Deceased) in Civil Appeal No. 5534 of 2019 (Arising out of S.L.P(C) No. 3053 of 2019 dated July 15th 2019** which has been referred by the learned Judge has clarified that the effect of not filing copy of decree along with execution application, the objection is not maintainable and as wrong as formal decree was not passing the order dated 1.6.2012 was directed to be treated as decree during the interregnum period by virtue of Order 20 Rule 6A (2) of the Code meaning thereby this order will have effect of decree till actual passing of the decree by the Court for the purpose of execution or for not other purpose. The reliance on the aforesaid provision, pertaining to the contents of the decree and said Rule 6A which prescribe the mode in which the decree shall be prepared and it

is stipulated that every endeavour shall be made to draw the decree as expeditiously as possible and within 15 days from the date of on which judgment is pronounced. This stipulate that a judgment being in existence upon which the decree is sought to be drawn.

In the present case, while passing order the learned Judge in Regular Darkhast has committed grave error in relying upon the decision of the Apex Court and has drawn wrong inference to the effect that the Darkhast is maintainable.

The impugned order deserve to be quashed and set aside and the writ petition is allowed.

Needless to state that nothing prohibits the wife from instituting the proceeding, if maintainable in law, seeking maintenance for herself as well as her children.

[SMT. BHARATI H. DANGRE, J.]

ssc/