

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 2401 OF 2020
IN
FAMILY COURT APPEAL NO. 20 OF 2020

Sau. Pooja Vijay Lokhande	...	Applicant
<i><u>Versus</u></i>		
Vijay Sidram Lokhande	...	Respondent.

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Mr. Suhas Inamdar, for the Applicant.
Mr. Kiran Bhangé i/by Ms. Madhuri Kakde for the Respondent.

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**CORAM : NITIN W. SAMBRE &
SHARMILA U. DESHMUKH, JJ.**

DATE : June 16, 2023.

P. C. :

1. The proceedings jointly initiated by the husband and wife after matrimonial discord for divorce by mutual consent under Section 13(B) of the Hindu Marriage Act, 1955, came to be allowed *vide* impugned judgment which is assailed in this Appeal.

2. The counsel for the Respondent has raised preliminary objection in light of the provisions of sub-Section (2) of Section 19 of the Family Courts Act, 1984, which creates an embargo on maintainability of the appeal as the order of divorce is passed by consent.

3. In the aforesaid background, it is claimed by the counsel for the appellant that since the decree is obtained by practicing fraud by the husband, the appeal is maintainable. He has drawn support from the judgment of the Division Bench of Patna High Court in the case of *Pusha Devi Vs. Tinku Kumar* in *Miscellaneous Appeal No.1094 2016*, decided on *21st February, 2018*. According to him, the exception to the aforesaid embargo created under Section 19(2) of the Family Courts Act, is in case if the appeal is preferred against a decree allegedly obtained by playing fraud. He has also drawn support from the similar provisions of Section 96(3) and Order XLIII Rule 1-A of the Code of Civil Procedure, 1908 (for short, “CPC”).

4. As per the said judgment, provisions of CPC and the Family Court Act, even if it is claimed that appeal is maintainable however in the case in hand decree was obtained by consent. Whether such decree was obtained by practicing fraud, can be an issue which require appreciation based on the pleadings and evidence. In the case in hand, the fact remains that the decree was passed on a joint application moved by the husband and wife, before which the parties have appeared before the counselors. It is claimed that the common application for decree by consent was moved through the same lawyer.

5. In this background, we are of the view that for deciding this issue as to whether decree is obtained by fraud, the evidence of the parties is necessary.

6. The other option/remedy provided to the appellant or aggrieved parties is to move under Section 151 of the CPC before the very same Court, who has passed the consent decree.

7. We have given such an option to the counsel for the appellant. After obtaining telephonic instructions, he informs that he is ready to go before the same Court, under Section 151 of the CPC.

8. In such an event, we deem it appropriate to dispose of the present appeal as withdrawn.

9. The withdrawal is conditional as the appellant is permitted to approach before the same Court under Section 151 of the CPC provided that the appellant approaches the said Court within four weeks from today.

10. In such case, if the issue of limitation crops up, the said Court shall be sensitive and conscious of the fact as to time spent by the appellant prosecuting the present appeal before this Court.

11. The Appeal accordingly stands disposed of.

12. Needless to clarify that this Court has not gone into the merits of the matter and the contentions of the parties are kept open.

[Sharmila U. Deshmukh, J.]

[Nitin W. Sambre, J.]