

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

INTERIM APPLICATION NO. 10375 OF 2022

IN

FAMILY COURT APPEAL NO. 173 OF 2019

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Himani Akash Kamal

..Applicant

In the matter between:

Akash Kanwarlal Kamal

.. Appellant

V/s.

Himani Akash Kamal

..Respondent

Mr.Vikramaditya Deshmukh a/w Ms. Shreni Shetty, Ms. Pavitra Pillay, Ms. Swati Chandan i/b M/s. ANB Legal, for the Applicant/Respondent.

Mr.Firadaus Moosa a/w Mr. Rajesh Dharap for Appellant.

CORAM : R.D.DHANUKA AND

M.M.SATHAYE, JJ.

RESERVED ON : 27th JANUARY 2023

PRONOUNCED ON : 27th MARCH 2023

: ORDER (PER: M.M.SATHAYE,J.):

1. This Interim Application is a classic example of increasing tendency amongst the litigants to try to overreach the provisions of Law by creating a situation, which is difficult to reverse, thereby

making pending proceedings infructuous. In the present case, such effort is made by a wife in a matrimonial dispute arising out of divorce proceedings.

2. This is an application filed by Applicant-wife (Respondent in Appeal) praying for dismissal of Appeal (FCA No. 173/2019) on account of her second marriage. An alternative prayer is made to vacate the interim order passed by this Court dated 11.10.2019 in IA No. 1/2019 and for expeditious hearing of the appeal.

3. It is the case of the Applicant-Wife that marriage between the Applicant and Respondent was solemnized on 09.08.2006 as per Hindu rites and rituals. The parties were blessed with a son named Arjun, who was born on 17.05.2008. Due to cruel treatment by Respondent-husband, the Applicant was forced to leave the matrimonial house and she filed petition for divorce and for relief of custody of child. On 12.07.2019, the Family Court No.5, Mumbai partly allowed the Applicant's claim and marriage between the Applicant and Respondent was dissolved by decree of divorce with effect from the date of the decree, giving her permanent custody of child Arjun. The Respondent Husband was permitted to have access on week-ends.

4. It is submitted by the Applicant Wife that on 06.10.2019 (within 90 days from the date of decree), she remarried to one Pradip Mannadiar, a German national of Indian origin and at the time of that marriage, she was not aware of the present Family Court Appeal filed by the Respondent-husband. It is further submitted that on 09.10.2019, the papers and proceedings of present Family Court Appeal came to be served on the Applicant and for the first time, she

got the knowledge of pendency of the present Appeal. It is further submitted that on 11.10.2019, when this Family Court Appeal was listed in this Court, the Applicant disclosed to the Court that she has already remarried, when an order of interim stay is passed by this Court. It is submitted orally before us that on that day, no documentary evidence was produced by Applicant Wife in support of her claim of being already re-married and therefore interim stay has been granted by way of abundant precaution.

5. The Applicant contends that she has contracted second marriage when she had no knowledge of the present Appeal and after the second marriage and her cohabitation with her second husband, no purpose would be served in keeping the present Family Court Appeal pending. It is contended that the marriage between the Applicant and Respondent has been broken irretrievably and the same is dead from 2013 and since then the parties have not cohabited. On these grounds, the Applicant prays that the present Family Court Appeal be dismissed or the interim order dated 11.10.2019 granting stay to the dissolution of marriage, be vacated and the appeal be heard expeditiously.

6. The Respondent-husband (original Appellant) has filed a reply and has opposed this interim application. It is contended by the Respondent-husband that the Applicant had remarried without waiting for the statutory period of Appeal, as required under Section 15 of the Hindu Marriage Act, 1956. It is submitted that the Applicant-wife has married hastily within a short span from the date of impugned decree and has immediately applied for child's passport without the knowledge and consent of the husband to deprive him of access. It is contended that the Respondent-husband came to know

about the second marriage of the Applicant on 11.10.2019 i.e. the date when the present Appeal was listed for admission, and a statement was made by Applicant's advocate across the bar. It is further contended that Respondent-husband was shocked to know about the Applicant's second marriage and the manner and haste in which it was done and disclosed. It is submitted that in such situation, he prayed for interim protection directing the Applicant not to take their child out of jurisdiction of this Court and for stay of the impugned judgment and decree. This Court accordingly passed an order dated 11.10.2019 in IA No. 1/2019 in FCA No. 173 of 2019 restraining the Applicant from taking child Arjun out of country without permission of the Court, under order dated 11.10.2019 passed in FCA No. 174 of 2019 and stayed the judgment and decree passed by the Family Court.

7. It is further submitted by the Respondent-Husband that the action of the Applicant is malafide and has been taken to over-reach the provisions of law and is an attempt to make the appeal filed by him infructuous. It is contended that since the Applicant has not even waited for the appeal period to get over, no indulgence should be shown to her and such conduct of the Applicant-wife be taken serious note of. It is further submitted that the interim stay granted by this Court, in the peculiar facts and circumstances, on 11.10.2019, must continue during pendency of this Family Court Appeal and it cannot be vacated at the instance of the Applicant-wife who has scant regards for the provisions of law and who has not found it proper to even wait for the appeal period to get over. It is further submitted that the Respondent-husband has very good case on merits and the mere fact of Applicant's second marriage cannot render his appeal infructuous.

8. Learned counsel for the Applicant vehemently argued in support of the Applicant's case and relied upon the following judgments.

(i) Lila Gupta v/s. Laxmi Narain and Ors.¹

(ii) Anurag Mittal v/s. Shaily Mishra Mittal²

(iii) Krishnaveni Rai v/s. Pankaj Rai and Anr.³

(iv) Darshana w/o Alok Borkar v/s. Alok Namdeo Borkar⁴

REASONS AND CONCLUSIONS

9. We have carefully perused the record and heard both the sides at length. We have also considered above case law.

10. It is seen that the date of marriage is 09.08.2006. The date of the divorce decree is 12.07.2019. The Appeal is filed on 21.09.2019. The notice was tried to be served upon the Applicant-wife on 03.10.2019, which is seen from speed post packet returned with acknowledgment of not finding the Applicant at the address and therefore, intimation being given on 03.10.2019. The speed post acknowledgment in the form of copies of envelopes are placed on record at Exh.B by Respondent-husband along with his Affidavit-in-Reply. The date of remarriage by the Applicant-wife is 06.10.2019 and according to the Applicant herself, she acquired knowledge about the present pending Appeal on 09.10.2019. In this backdrop, the interim relief is passed by this Court on 11.10.2019.

1 (1978) 3 SCC 258

2 (2018) 9 SCC 691

3 (2020) 11 SCC 253

4 2022(1) Mh. L.J.713

11. In view of the 3 Judges' Bench Judgment of this Court in the matter of Shivram Dodanna Shetty v/s. Sharmila Shivram Shetty⁵, in F.C.A. No. 161 of 2013 the appeal period for filing appeal u/s. 19 of the Family Courts Act is 90 days from the date of Decree in Family Court. Being a statutory appeal, it is needless to mention that all provisions of exclusion of time period required for obtaining certified copy etc. under Limitation Act, would apply here.

12. It is the case of the Applicant that on 11.12.2019, the Applicant in her reply to the Interim Application No. 1672 of 2019 in Family Court Appeal No. 174 of 2019, once again brought the factum of second marriage to the notice of this Court. It is contended in the Interim Application that due to the pandemic, the present Appeal and Family Court Appeal No. 174 of 2019 were not heard and continued to remain pending and consequently, the second marriage of the Applicant, contracted after the dissolution of first marriage, cannot be legally registered or socially accepted. The Applicant contended that the second marriage was contracted bonafide, when the Applicant had no knowledge of the present Appeal. The Applicant sought dismissal of the Family Court Appeal admitted by this Court on the ground that the Family Court Appeal filed by the husband has become infructuous.

13. A perusal of Section 11 of the Hindu Marriage Act, 1955 provides that any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.

5 2017(1) Mh.L.J.

14. Section 5 of the said Hindu Marriage Act, 1955 provides that a marriage may be solemnized between any two Hindus, if the conditions mentioned therein are fulfilled. Section 5(i) provides that neither party has a spouse living at the time of the marriage and in that event, marriage may be solemnized between two Hindus.

15. Section 15 of the Hindu Marriage Act provides that when a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

16. From the aforesaid dates, it is clear that the Applicant-wife has not waited till the appeal period was over and has remarried and has taken a risk to be at odds with the law. Admittedly, the appeal period was not over when the Applicant had remarried. From the aforesaid dates, it is also clear that the Respondent-husband was diligent enough to come to the Court as soon as possible and within the prescribed period of limitation to file the appeal and in fact the present Family Court Appeal was filed, numbered and pending on the date of remarriage. This has a bearing on the matter in view of the word “presented” used in Section 15 of the Hindu Marriage Act, 1955 (hereinafter ‘the said Act’ for short) which is quoted below for ready reference :

*“15. Divorced persons when may marry again. -
When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for*

appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again:

34[***]

34. Proviso omitted by Act 68 of 1976, S.10(w.e.f.27-5-1976).

17. Learned counsel for the Applicant has not disputed that the alleged second marriage was contracted by the Applicant during the period when the period for filing an appeal against the decree passed by the Family Court had not expired. Though the Applicant made a statement before this Court that the Applicant had already contracted second marriage before service of the papers and proceedings upon her and thus not aware of the factum of filing of Family Court Appeal by the husband, no proof in support of the said statement is produced till date. In our view, the Family Court Appeal filed by the husband within the appeal period would not be rendered infructuous upon the Applicant having contracted second marriage and that also during the appeal period.

18. In the aforesaid facts and circumstances, now we proceed to decide the effect of Applicant's remarriage on the continuity of the present Family Court Appeal filed by the Respondent-husband.

19. Let us consider various judgments relied upon by the Applicant in support of her case. In the case of **Lila Gupta Vs. Laxmi Narain And Others** (supra), learned 3-Judges Bench of the Supreme Court has considered whether a marriage contracted in contravention of the proviso to Section 15 of the Hindu Marriage Act, 1955 is void or merely invalid not affecting the core of marriage? In para 12 the said judgment itself, the Supreme Court has

clarified position that the said proviso to Section 15 is omitted/deleted w.e.f 27.05.1976. On a comprehensive review of various provisions of the Hindu Marriage Act, 1955, the Supreme Court has held that the said Act is conspicuously silent on the effect of a marriage solemnized in contravention of the time bound prohibition enacted under Section 15 and such a marriage is not expressly declared as void nor it is made punishable. It is further observed that a person whose marriage is dissolved by a decree of divorce, suffers from an incapacity for a particular period for contracting the second marriage. In paragraph 20 thereof, the Hon'ble Supreme Court has summarized the position as below:

“20. Thus, examining the matter from all possible angles and keeping in view the fact that the scheme of the Act provides for creating certain marriages void and simultaneously some marriages which are made punishable yet not void and no consequences having been provided for in respect of the marriage in contravention of the proviso to Section 15, it cannot be said that such marriage would be void.”

20. After carefully going through the facts of that case it is seen that the Hon'ble Supreme Court has given all these findings, while considering the legality of second marriage in contravention of Section 15 of the Hindu Marriage Act, 1955, at the time of final hearing and when the rights of the parties were being decided finally.

21. The Supreme Court, in the said case had considered proviso to Section 15 which was then not deleted and held that the said proviso was obligatory and mandatory. The unamended Section 15 of the Hindu Marriage Act reads thus:

"15. When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance."

In our view, the said judgment dealing with the unamended provisions of Section 15 would not advance the case of the Applicant. We are called upon to consider the effect of the Applicant's second marriage on the legality of divorce decree, at interim stage during pendency of the Family Court Appeal, when the issue of legality of divorce is not yet finally decided. The effect of contravention of Section 15 in the light of her conduct of remarriage in haste without waiting for the appeal period to be over, on the final outcome of appeal filed by the husband, can be dealt with only at the stage of final hearing. In our view, effect of such remarriage (in contravention of Section 15 of the said Act) on the final outcome of the pending appeals, depends on facts of each case.

22. So far as the second judgment relied upon in the case of **Anurag Mittal Vs. Shaily Mishra Mittal** (supra) is concerned, the facts of that case are clearly distinguishable insofar as, in that case, during the pendency of the Appeal, there was settlement between the parties and the Appellant-husband did not intend to contest the decree of divorce and he made his intention clear of withdrawal of Appeal and with such situation the second marriage was contracted. In the

present case, the Appeal filed by the husband is very much alive and pending. Learned counsel for the original Appellant-Husband has stated in unequivocal terms that Appellant Husband intends to challenge legality of impugned decree of divorce and according to him, he has very good case on merits and has sanguine hope of success in the present Family Court Appeal. In that view, the aforesaid judgment will not assist the case of the Applicant.

23. So far as the third judgment relied upon by the Applicant is concerned in the case of **Krishnaveni Rai Vs. Pankaj Rai and Another** (supra), the facts of that case are also clearly distinguishable, in so far as, in that case, re-marriage had taken place as no appeal was filed within the limitation. In that case the appeal was preferred almost one year after expiry of period of limitation and in that context, Hon'ble Supreme Court was considering the arguments of bar under Section 15 of the Hindu Marriage Act, 1955. In the present case at hand, admittedly, the husband has filed present Appeal within prescribed period of limitation and there is no delay and the Family Court Appeal is already admitted and pending for final hearing. In that view the aforesaid judgment will not assist the case of the Applicant.

24. So far as the fourth judgment relied upon by the Applicant Wife in the case of **Darshana Alok Borkar Vs. Alok Namdeo Borkar** (supra) is concerned, the Division Bench of this Court was considering the Family Court Appeal preferred over a decree of divorce for 'final hearing'. The Division Bench of this Court, at that stage, held that a marriage contracted in violation of Section 15 of the said Act, would not be void but merely invalid.

25. It is therefore imperative not to jump to a conclusion about the effect of Applicant's re-marriage in contravention of Section 15 of the said Act, at this stage. It is important to note that, by this interim application, we are called upon to consider the effect of the Applicant's second marriage on the legality of divorce decree, at interim stage during pendency of the Family Court Appeal, when the issue of legality of divorce is not yet finally decided. The effect of contravention of Section 15 in the light of her conduct of remarrying in haste without waiting for the Appeal period to be over, can be dealt with only at the stage of final hearing. In our view, effect of such remarriages (in contravention of section 15 of the said Act) on the final outcome of the pending appeals, depend on facts of each case and no straight jacket formula can be applied.

26. The boldness with which a prayer is made, asking this Court to dismiss the Appeal on the ground of second marriage of Applicant made in contravention of Section 15 of the Hindu Marriage Act, 1955, and the manner and vehemence with which the present application is argued, surprises us.

27. In our considered opinion, the arguments advanced on behalf of the Applicant, can at best, be the arguments at the time of final hearing of Appeal, to urge that in the situation created by the Applicant, the appeal of the husband may not be allowed. But certainly, in our opinion, present arguments cannot be advanced as a matter of right at the interim stage.

28. So far as remaining prayers in the application are concerned, for the reasons recorded above, we feel that no fruitful purpose will

be served by vacating the Order dated 11.01.2019 passed by this Court granting interim stay to the dissolution of marriage.

29. That leaves us with the only remaining prayer for expeditious hearing of the present Family Court Appeal, which we grant in the facts and circumstances narrated above.

30. Hence, we pass the following order:

- (i) The Application is dismissed. No Order as to costs.
- (ii) Hearing of the present Family Court Appeal is expedited.
- (iii) Printing is dispensed with. Original Appellant-Husband is directed to file private paper-book within eight weeks from today in present FCA No. 173/2019 and connected FCA No. 174/2019.
- (iv) Liberty to mention the appeal for final hearing, thereafter.

(M. M. SATHAYE, J.)

(R.D.DHANUKA, J.)