

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10166 OF 2022

Sharayu Sadanand Subhedar)
Alias Sharayu Yashodhan Agalgaonkar,)
Age : 52 yeas, Occu. - Service,)
R/o. Plot No. 42, Nargundkar Colony,)
Guruprasad Nagar, Belgavi-590006,)
Karnataka.) ...Petitioner

VERSUS

Yashodhan Prakash Agalgaonkar,)
Through his Power of Attorney,)
Prakash Ramkrishna Agalgaonkar,)
Age : Adult, Occu. - Service,)
R/o. Sandhi Prakash Bangalow,)
T. K. Patil Society, Behind Laxmi Temple,)
Kupwad Road, Sangli-416416) ...Respondent

...

Mr. Sandesh Patil i/b. Mr. Prashant Darandale, for Petitioner
Mr. Akshay Kulkarni i/b. Mr. A. M. Kulkarni, for Respondent.

...

CORAM: SANDEEP V. MARNE, J.
DATE : 21st FEBRUARY, 2023.

JUDGMENT:

1. Rule. Rule is made returnable forthwith and with the consent of the parties, called out for hearing.

2. The extent of power of Court to correct a decree under Section 152 of the Code of Civil Procedure 1908 is the issue involved in the present Petition. Issue arises out of challenge set up by Petitioner to the order dated 27th June, 2022 passed by the Jt. Civil Judge, Senior Division, Sangli thereby allowing application filed by Respondent at Exh.72 for correction of decree dated 22nd April, 2022.

3. Petitioner-wife and Respondent-husband had filed petition under Section 13(B) of the Hindu Marriage Act, 1955 for dissolution of their marriage by mutual consent. By judgment and order dated 22nd April, 2022, the 2nd Jt. Civil Judge, Senior Division, Sangli allowed the petition and declared that their marriage is dissolved by mutual consent. Accordingly, the decree was formed in terms of the judgment and order on 02nd May, 2022.

4. Respondent-husband thereafter filed application at Exh. 72 on 06th June, 2022 for correction of the decree by inclusion of memorandum of settlement therein. The advocate for petitioner-wife made an endorsement on the application to the effect that he was unable to contact Petitioner as she has settled at Belgavi, Karnataka and that therefore the court should issue notice to her seeking reply on the application. The court thereafter proceeded to pass order dated 27th June, 2022 allowing the application filed by the husband and corrected the operative part of the judgment as under-

- 1) Petition is allowed.
- 2) It is hereby declared that marriage of Shri. Yashodhan Prakash Agalgaonkar and Sharayu Yashodhan Agalgaonkar, solemnized on 11.12.2009 is dissolved from the date of this order as per Section 13(B) of the Hindu Marriage Act as stated in deed of settlement.
- 3) Deed of settlement dated 11.04.2022 be treated as part and parcel of decree.
- 4) Copy of decree be given to parties free of cost under Section 23(4) of Hindu Marriage Act.
- 5) Decree be drawn up accordingly.
- C) The above corrected operative part of judgment be read instead of earlier operative of judgment and corrected the decree accordingly.

5. Petitioner-wife has challenged the order dated 27th June, 2022 in the present petition.

6. Appearing for the Petitioner-wife, Mr. Patil the learned counsel would submit that the Court has committed an error in allowing the application without seeking reply of Petitioner. That her advocate had made a specific endorsement requesting the court to issue notice to petitioner and instead of doing so, the court has erroneously recorded finding that Petitioner failed to file reply despite giving sufficient chance. He would further submit that the parties had consciously not included memorandum of settlement in their application seeking divorce by mutual consent. That, having rendered the judgment and decree, the court had become *functus officio* and could not

have added memorandum of settlement in the decree by the impugned order. He would submit that the provisions of Section 152 of the Code of Civil Procedure (Code) could not have been invoked by the court for adding something which was never intended to be added in the decree. That the memorandum of settlement was never filed alongwith the application before the court and that therefore omission to include the same cannot be treated an 'accidental slip' within the meaning under Section 152 of the Code. In support of his contention Mr. Patil would rely upon judgments of the Apex Court in **Plasto Pack, Mumbai & Anr. Vs. Ratnakar Bank Ltd.** (2001) 6 SCC 683 and **K. Rajamouli Vs. A. V. K. N. Swamy**, (2001) 5 SCC 37.

7. Mr. Kulkarni the learned counsel appearing for the Respondent-husband would oppose the petition and support the order passed by the court. He would submit that the memorandum of settlement was drawn between the parties after mediation by a mediator appointed by this court. That the memorandum of settlement was executed on 11th April, 2022 and inadvertently not included in the decree. That the parties agreed for divorce by mutual consent on the basis of various terms and conditions stipulated in the memorandum of settlement, which forms integral part of the judgment and decree of mutual divorce. That memorandum of settlement was acted upon by production of its copy in another set of proceedings before this

court on 13th April, 2022. That the real intention of the Petitioner in filing this petition is to wriggle out of terms and conditions of memorandum of settlement. He would pray for dismissal of the petition.

8. Rival contentions of the parties now fall for my consideration.

9. The marriage between Petitioner and Respondent was solemnized on 11th December, 2009. Out of the wedlock, two daughters are born to the couple. There was marital discord between them leading to filing of various proceedings against each other. It appears that the parties filed as many as 12 proceedings against each other. In one such proceedings, they were referred to mediation before Dr. Shalini Phansalkar Joshi, former judge of this court, before whom mediation was successfully conducted and the parties agreed to resolve their disputes. A memorandum of settlement came to be drawn and executed on 11th April, 2022 which is signed not only by the Petitioner and Respondent but by several of their relatives. Immediately after execution of the memorandum of settlement on 11th April, 2022 the same were filed before this court in one of the pending proceedings on 12th April, 2022. This court took notice of the memorandum of settlement and disposed of Miscellaneous Application No. 223 of 2018, Criminal Application No. 37 of 2020, Civil Revision Application Stamp No. 27530 of 2019, Revision No. 12954 of 2019 and Writ Petition No. 9690 of 2019.

10. Both parties accordingly jointly applied for grant of divorce by mutual consent before Jt. Civil Judge, Senior Division, Sangli. Respondent-husband contends that memorandum of settlement dated 11th April, 2022 was filed before the court, but it did not notice the same. On the contrary, it is the contention of petitioner-wife that the memorandum of settlement was consciously not filed before the court as the same was never intended to be incorporated in the judgment and decree.

11. Without going into factual dispute as to whether memorandum of settlement was indeed filed in the court before 22nd April, 2022 or not, I am of the view that the same ought to have been brought to the notice of the court at the time of passing the judgment and order dated 22nd April, 2022. Perusal of the memorandum of settlement would indicate that the parties have agreed to be abide by several terms and conditions including custody and maintenance of daughters, visitation rights, return of streedhan, etc. Clause 4.10 of the memorandum of settlement provides for visitation right in favour of Respondent-husband once in 15 days in addition to birthdays and festivals. Since the memorandum of settlement incorporates several terms and conditions, on the basis of which parties agreed to resolve their disputes, the same ought to have been brought to the notice of the Trial Court at the time of passing of the judgment and order dated 22nd April, 2022.

12. Now I turn to the next issue as to whether the court could have to corrected the decree under the provisions of Section 152 of the Code. Section 152 of the Code reads thus;

“152: Amendment of judgments, decrees and orders - Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.”

13. Thus, under Section 152 of the Code, the court is vested with necessary powers to correct the clerical or arithmetical mistakes in the decree or error arising from any accidental slip or omission. The power can be exercised *suo motu* or on an application made by any of the parties. Mr. Patil has contended that the prayer made by Respondent in his application is outside the scope of the provisions under Section 152 of the Code. I am unable to agree. Since parties agreed to dissolve their marriage by mutual consent in the memorandum of settlement, the draft thereof ought to have been produced before the Trial Court. Since the same was not produced, then it would be covered by expression ‘errors arising therein from any accidental slip or omission’. Non-incorporation of memorandum of settlement in the judgment and decree was clearly an omission. The true purport of Section 152 of the Code is to enable the court to correct any error or omission in the decree.

14. Rejection of Respondent's application for correction of decree \would result in a situation of unconditional dissolution of marriage. The parties in such a situation would be in a position to take a stand that the memorandum of settlement is not binding upon them. By correcting the decree by incorporating the memorandum of settlement therein, the court has avoided creation of such a situation. This is the exact purpose for which power to correct a decree is conferred upon court under Section 152 of the Code.

15. It must be borne in mind that the settlement between the parties has taken place on account of successful mediation conducted by a retired judge of this court. Not only Petitioner and Respondent, but their relatives have signed the memorandum of settlement. The memorandum of settlement was filed before this court immediately on the following day i.e. on 12th April, 2022 and by taking note of same, this court has disposed of several proceedings by it's order dated 13th April, 2022. In such circumstances it is quite perplexing as to why the Petitioner-wife is now opposing incorporation of memorandum of settlement in the decree.

16. It is contended that the court has committed an error in not issuing notice to petitioner after noticing the endorsement made by her advocate on the application at Exh.72 to the effect that he did not have instructions on

account of his inability to contact her. Petitioner had signed memorandum of settlement on 11th April 2022. Her Advocate was in a position to obtain instructions till 22nd April 2022 when the decree was passed. How he suddenly lost contact with her within a month and half by 6th June 2022 remains a mystery. Even if she indeed left for Belgavi as contended in the endorsement, the Advocate could have contacted her by various modes such as mobile phone or email. Be that as it may. Since Petitioner did file her reply to the application for correction of decree, I have heard the learned counsel for the petitioner about the exact objection to incorporation of memorandum of settlement in the decree. Mr. Patil has advanced detailed submissions on the power of the court to correct the decree under Section 152 of the Code. Therefore, damage caused by non-filing of reply by her, if any, is obviated. I therefore do not consider it necessary to remand the matter back to the court for granting an opportunity to the petitioner to file her reply for the purpose of passing of the order afresh.

17. Considering the background and purpose for which the memorandum of settlement is executed between the parties as well as their conduct in filing the same in this court for the purpose of disposal of other proceedings filed by them, I do not find any error being committed by the court in correcting the decree under the provisions of Section 152 of the Code.

18. What is remains now is to deal with judgments cited by Mr. Patil. In **Plasto Pack** (supra) the case involved altogether different facts. In that case, the court, under the garb of correcting a decree, had completely altered operative part of the order by granting some prayers which were earlier not granted. In the light of this background, the Apex Court held in paragraph No.12 of the judgment as under;

“12. By order dated 3.3.1995 relief (a) set out in the plaint was granted 'as it was', without specifying the exact decretal amount and the rate of interest allowed by the Court. Such of the prayers as were not granted by decree dated 3.3.1995 would be deemed to have been refused and to that extent the suit shall be deemed to have been dismissed. **More than two years and eight months later the Court could not have, on a mere notice of motion, substituted almost a new decree in place of the old one by granting such reliefs as were not granted earlier** and that too without noticing the defendant-appellants. As held in K. Rajamouli Vs. AVKN Swamy, (2001) 5 SCC 37 power to amend a decree cannot be exercised so as to add to or subtract from any relief granted earlier. A case for setting aside the decree was earlier made out. In the facts and circumstances of the case the Division Bench ought to have taken a liberal view of the events and entertained the appeal for consideration on merits by condoning the delay in filing the same. However, that was not done. We are satisfied that grave injustice has been done to the appellants by denying them an opportunity of hearing and contesting the suit on its merits. We are also of the opinion that the respondent-bank ought to have taken a reasonable stand and should have sympathetically considered the proposal of the appellants which was not lacking in bona fides and in the interest of avoiding litigation and early recovery of outstanding debts the respondent should have compromised the suit. Even if the appellants' proposal was not acceptable to the respondent, at least a counter-proposal should have been made in which case

across the table discussion between the parties with the assistance of their learned counsel would have brought out a mutually accepted resolution and an end to the litigation. We are constrained to observe that this litigation is being perpetuated because of the unreasonable and rigid attitude of the respondent-bank.”

(emphasis supplied)

19. Thus, in **Plasto Pack** (supra) the decree was corrected after passage of more than 2 years and 8 months and a new decree was substituted in place of the earlier decree. In the present case on the contrary, the decree dated 22/04/2022 was corrected immediately on 27th June, 2022. The correction in the decree does not amount to any alteration in the operative portion. All that is done is to incorporate the memorandum of settlement dated 11th April, 2022 for being treated as part and parcel of decree. Memorandum of settlement is executed by both the parties and were intended to be filed in court to seek dissolution of marriage. Thus, facts in **Plasto Pack** (supra) is clearly distinguished.

20. In **K. Rajamouli** (supra) neither Arbitrator nor Civil Court had awarded any *pendente lite* interest. The execution court therefore rejected prayer for grant of *pendente lite* interest @ 24%. The civil writ petition filed challenging decree was rejected by the High Court. Thereafter the decree holder filed interlocutory application before the trial court for amendment of a decree under Section 152 of the Code. It is in the light of this factual

position, that the Apex Court has held that the power under Section 152 of the Code cannot be used to add or subtract any relief except what has been provided in the judgment. In the present case, no new relief is granted by the court by correcting decree. It has merely incorporated the memorandum of settlement jointly executed by the parties. The judgment therefore has no application to the facts and circumstances of the present case.

21. I am therefore of the view that the court has not committed any error in allowing the respondent's application for correction of decree by passing the impugned order. The petition is devoid of merits. It is dismissed with no order as to costs. Rule is discharged.

(SANDEEP V. MARNE, J.)