

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

**FAMILY COURT APPEAL NO.48 OF 2018
WITH
CIVIL APPLICATION NO.212 OF 2018
IN
FAMILY COURT APPEAL NO.48 OF 2016**

Smt.Soniya Vinod Budukh ..Appellant

V/s.

Shri.Nitish Shirish Malpathak ..Respondent

Mr. Jai A. Vaidya for the Appellant and Respondent in CA NO.212/2018.

Mr. S. S. Kulkarni for the Respondent and Applicant in CA No.212/2018.

**CORAM : R.D.DHANUKA, AND
M.M.SATHAYE, JJ.**

DATE : 24th FEBRUARY 2023

P.C.

1. This is an appeal filed by Wife who had filed Petition (P.A. No.217/14) under Section 12 (1)(c) of the Hindu Marriage Act, 1955 ("the said Act" for short) against the Respondent, seeking dissolution of marriage on the ground of its nullity. The said petition filed by the Wife was opposed by the present Respondent/Husband and the parties went for trial. By the Judgment and Decree dated 12/06/2017, the learned Judge, Family Court No. 5, Pune has dismissed the said petition.

2. Being aggrieved by the said Judgment and Decree, the wife has filed present Family Court Appeal which is already admitted and pending for final disposal.

3. During the pendency of the present Appeal, Respondent - Husband has filed Civil Application No.212/2018 for framing additional issue and permission to lead additional evidence, contending, inter alia, that there is a ground taken in the Appeal Memo viz. Ground No.(D), for the first time which is distinct, separate and not covered u/s. 12(1)(c) of the said Act. It is the case of the Respondent - Husband that the said ground is taken in respect of the marriage being within the prohibited degree of relationship and the parties being sapindas of each other as envisaged u/s. 5(iv) and 5(v) of the said Act. It is the case of the Respondent-Husband that present Appellant-wife was fully aware about the custom in their community prevailing for solemnization of such marriages and the same was never controverted in the original petition. In short, it is the case of the Respondent-Husband that so far as the ground of marriage being nullity, as solemnized between prohibited degree or between sapindas, is a mixed question of law and facts and

would therefore require both framing of additional issues and leading of additional evidence by both the parties.

4. We have heard learned counsel for Appellant-Wife, who submitted that Appellant-Wife has filed reply to the said Civil Application, disputing averments made therein. She however, fairly submits that the ground 'D' raised by her in the Appeal is an additional ground which is a mixed question of fact and law and would require both, framing of additional issues and leading of additional evidence by the parties.

5. In our opinion, the case made out by the Husband in the Civil Application, as well as Reply filed by the Wife can be treated as rival pleadings and based on that, additional issues can be framed and finding can be invited from Trial Court, after giving an opportunity to both sides to lead evidence. Learned counsel for both parties have submitted that such issues can be framed by consent of both the parties, who are ready to lead evidence.

6. Therefore, by consent of the parties, following additional issues are framed :

i) Whether the Appellant / Wife proves that the marriage solemnized between the parties is void owing to the parties being *sapindas* of each other or being within prohibited degree of relationship ?

ii) If yes, whether the Respondent / Husband proves that the marriage between the parties is permitted under the Custom or usage governing the parties ?

7. The matter is remanded to Family Court, Pune for limited purpose of giving findings on aforesaid additional issues, after giving opportunity to both parties to lead evidence thereon. Parties are directed to appear before the Family Court, Pune on 17/03/2023 and produce the copy of this order.

8. Family Court, Pune is directed to record the evidence of the parties and render finding on the aforesaid additional issues with a request to complete the aforesaid exercise on or before 30/06/2023. The Family Court, Pune is at liberty to schedule dates of this matter, as it deems fit, and both the parties are directed to co-operate and not to take unnecessary adjournments.

9. Record and Proceedings received in this Court, is directed to be transmitted back to the Family Court, Pune.

10. Civil Application No. 212 of 2018 is disposed off. However present Family Court Appeal No. 48/2018 is kept pending. Parties are at liberty to move this Court after the Family Court, Pune renders its findings as aforesaid.

(M.M.SATHAYE, J.)

(R.D.DHANUKA, J.)