

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

INTERIM APPLICATION NO.3012 OF 2021

IN

FAMILY COURT APPEAL (ST) NO.18151 OF 2021

IN

PETITION NO. F3183 OF 2018

Asha Devi Surendra Yadav

.. Applicant/Appellant

Versus

Surendra Prabhunarayan Yadav

.. Respondent

**Dr.Pawan Pandey a/w Suman Gupta i/b Dr.Pawan
Pandey & Associates**, Advocates for the Applicant-Wife.

Mr.Himanshu Singh, Advocate for the Respondent-Husband.

**CORAM : B. P. COLABAWALLA &
SOMASEKHAR SUNDARESAN, JJ.**

DATE : DECEMBER 14, 2023

P. C.

1. The above Family Court Appeal is filed assailing the order passed by the Family Court at Bandra dated 27th May, 2019. By this order, the marriage between Petitioner No.1 and Petitioner No.2, namely, the Appellant and the Respondent herein, solemnized on 16th February, 1998 was dissolved by mutual consent as per Section 13-B of

the Hindu Marriage Act, 1955 (for short "**the 1955 Act**") with effect from the date of the decree.

2. The aforesaid decree is challenged in the above Family Court Appeal on the ground that the same was obtained by playing a fraud on the Appellant-Wife and that the same was without proper inquiry whether the consent of the Appellant was obtained without exercising any undue influence. It is the case of the Appellant that the judgment and decree of the Hon'ble Family Court is non est in the eyes of law as the same is vitiated by fraud, undue influence and obtained by taking advantage of the ignorance of the Appellant who is an illiterate person. According to the Appellant, the Family Court ought to have perused the affidavit of the Appellant filed in the present case before giving a finding that there was no force, or fraud used by party. It is the case of the Appellant that in the affidavit of the Appellant only her name is put in place of the signature and no where in the affidavit of the Wife it is stated that the same was read over and explained to her in the language she understands. In fact a grievance is also made that the learned Judge has not stated that the same was interpreted to her and explained in the language known to her. It is basically on these grounds

that the present Appeal is filed challenging the decree passed by the Family Court at Bandra by mutual consent.

3. The learned advocate appearing on behalf of the Respondent took a preliminary objection on the maintainability of the above Appeal. He submitted that the present appeal is not maintainable because what is assailed in the present Family Court Appeal is a decree of divorce passed by mutual consent under Section 13-B of the 1955 Act. In support of this argument, the advocate brought to our attention the provisions of Section 19(2) of the Family Courts Act, 1984 (for short "**the 1984 Act**") which, according to him, clearly stipulates that no appeal shall lie from a decree or order passed by the Family Court with the consent of the parties. He also relied upon a decision of the Division Bench of the Delhi High Court in the case of ***Anshu Malhotra V/S Mukesh Malhotra [MAT.APP.(FC) No.86/2020, decided on 3rd June, 2020***]. The learned advocate submitted that the Delhi High Court, after going through the entire law on the subject, *inter alia* came to the conclusion that the law with respect to a consent decree is, that though an appeal is not maintainable there against, the remedy for an eventuality of the consent having been obtained forcefully or fraudulently or having been obtained by misrepresentation is, by

applying to the same Court. He submitted that the Delhi High Court has taken this view also taking into consideration that the Appeal Court cannot be converted into a fact finding Court, and if that were to be done, either party would lose their statutory right of appeal. He, therefore, submitted that the above Appeal ought to be dismissed and the Appellant be relegated to file an Application before the concerned Family Court for redressing her grievances raised in the present Appeal.

4. We have heard the learned advocates appearing on behalf of the Appellant and also the Respondent. We find considerable force in the argument canvassed on behalf of the Respondent. We find that the argument canvassed regarding the maintainability of this Appeal is squarely covered by the decision of the Delhi High Court in the case of **Anshu Malhotra (supra)**. The Delhi High Court, after considering the law on the subject including the provisions of Section 13-B of the 1955 Act, came to the conclusion that if a Consent Decree is assailed on the ground that the consent is obtained forcefully or fraudulently or having been obtained by misrepresentation, then the same has to be done before the same Court that passed the Consent Decree and not by way of an Appeal. The Delhi High Court held that it is only the Court that passed the Consent Decree which is capable of going into the said

facts and if it finds any *prima facie* merit therein, make an inquiry by recording evidence with respect thereto and thereafter take a final decision. The relevant portion of the Delhi High Court decision, for the sake of convenience is reproduced hereunder:-

"10. With respect to the aforesaid dicta of the Division Benches of the Punjab & Haryana High Court, we may respectfully state that it is not as if the court, in a civil suit, when presented with compromise terms under Order 23 Rule 3 CPC seeking a decree to be passed in terms thereof, is bound to pass a decree as sought. Order 23 Rule 3 CPC also provides that "where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by a lawful agreement or compromise in writing and signed by the parties...." shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith. For the court to be satisfied that a suit had been adjusted wholly or in part by a lawful agreement, the court has to necessarily satisfy itself that the compromise or agreement is of the own volition of the parties and the consent of either of the parties thereto is not under coercion or misrepresentation and the said agreement or compromise is not unlawful within the meaning of Section 23 of the Contracts Act, 1872. It is thus not as if the position under Order 23 Rule 3 CPC is any different from that under Section 13B or Section 23 of the HMA. However once the court is satisfied that the compromise arrived at is lawful and has passed a decree, against such decree, Section 96(3) of the CPC bars an appeal. We are therefore, with due respect to the Division Benches of the High Court of Punjab & Haryana, the opinion that the distinction as carved out by the Punjab & Haryana High Court qua a decree of dissolution of marriage by mutual consent vis-a-vis a suit before the civil court, does not exist.

12. It would thus appear that the view of the High Courts of Bombay, Gujarat, Allahabad, Kerala and Madras is the same as that of the High Court of Punjab & Haryana whose judgments are referred to by the counsel for the appellant i.e.

to the effect that an appeal under Section 19(1) of the Family Courts Act lies against a decree for dissolution of marriage by mutual consent and Section 19(2) does not bar such appeal. However it is also obvious from the narrative of the various judgments aforesaid that in each of the cases, decree for divorce by mutual consent had been passed in violation of the procedure provided by law and which violation was evident from the record before the Family Court and qua which no proper inquiry had been done by the Family Court.

13. *However the reason which has prevailed with the other High Courts for holding the appeal to be maintainable i.e. of the Family Court passing a decree for dissolution of marriage by mutual consent not merely on the basis of consent of the parties but also on the basis of its satisfaction, we state with all due respect, does not satisfy us. We say so because the same requirement is to be found in Rule 3 of Order 23 CPC also as aforesaid and qua which the law, as discussed hereinbelow, is clear, that no appeal lies against a consent decree. We are therefore unable to hold a decree for divorce by mutual consent of a Family Court to be standing on any different footing than a consent decree of a Civil Court under Order 23 Rule 3 of the CPC. We may in this context mention that the Rent Acts of various States also do not permit the Rent Controller to pass an order of eviction without satisfying itself, of a ground for eviction as provided under the Act being made out. However, under the said Acts also, it has been held that if from the order of eviction, though with consent, it is obvious that the Controller has satisfied himself/herself of a ground of eviction being made out, even if on the basis of admission of the tenant, such consensual order of eviction cannot be challenged. Reference in this regard may be made to **K.K. Chari Vs. R.M.Seshadri** (1973) 1 SCC 761, **Nagindas Ramdas Vs. Dalpatram Iccharam alias Brijram** (1974) 1 SCC 242, **Roshan Lal Vs. Madanlal** (1975) 2 SCC 785, **Nai Bahu Vs. Lala Ramnarayan** (1978) 1 SCC 58 and, **Shivshankar Gurgar Vs. Dilip** (2014) 2 SCC 465. It was held (i) an order of eviction based on consent of the parties is not necessarily void if the jurisdictional fact viz. a ground of eviction provided under the Act is shown to have existed when the Controller made the order; (ii) satisfaction of the Controller, which no*

doubt is a prerequisite for the order of eviction, need not be by the manifestation borne out by a judicial finding; (iii) if at some stage the court was called upon to apply its mind to the question and there was sufficient material before it, before the parties invited it to pass an order in terms of their agreement, it is possible to postulate that the court was satisfied about the grounds on which the order of eviction was based; (iv) if the tenant admits that the landlord is entitled to possession on one or other of the statutory grounds mentioned in the Act, it is open to the court to act on that admission and make an order for possession in favour of the landlord without further inquiry; (v) if there was material before the court when it passed the order of eviction by consent, from which it can be shown that the court was satisfied about the requirement of the landlord being bona fide, such an order will not be a nullity even without the Rent Controller's decision in favour of the landlord; (vi) admissions are by far the best proof of judicial facts and can be made the foundation of the rights of the parties; and (vii) it cannot be contended that the provisions of Order 23 Rule 3 of the CPC cannot apply to eviction suits governed by the special statutes; undoubtedly, a compromise of such suit is permissible under the provision of law; if the court is satisfied on consideration of the terms of the compromise that the agreement is lawful, as in any other suit, so in an eviction suit, the court is bound to record the compromise and pass a decree in accordance therewith, passing a decree for eviction on admission of the requisite facts in a compromise. Once it is so, Section 96(3) of the CPC would apply and appeal against such consent order would not be maintainable. Thus, having considered the persuasive value of the judgments aforesaid of the other High Courts, we are, with respect, unable to agree with the judgments aforesaid of the other High Courts and do not consider ourselves bound thereby.

- (20) *The other High Courts in the judgments referred by us hereinabove, appeared to have held the appeal against a decree for divorce by mutual consent to be maintainable, guided by the reason of making available a remedy to a spouse there against, if such a decree could not have been passed on the material available on record or had been*

*passed in violation of the procedure prescribed by law for passing thereof or if had been obtained by misrepresentation or fraud. However in none of the said judgments save the judgment of the Division Bench of the Gujarat High Court, we find any reference to the proviso to Rule 3 of Order 23 CPC and with respect whereto Supreme Court in **Pushpa Devi Bhagat vs. Rajinder Singh** (2006) 5 SCC 566 held as under:*

“17. The position that emerges from the amended provisions of Order 23, can be summed up thus:

- (i) No appeal is maintainable against a consent decree having regard to the specific bar contained in section 96(3) CPC.*
- (ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) Rule 1 Order 43.*
- (iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.*
- (iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23.*

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree, is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of

the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21.8.2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27.8.2001), filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by second defendant was not maintainable, having regard to the express bar contained in section 96 (3) of the Code.”

22. *As would immediately become obvious, the law with respect to consent decree is, that though appeal is not maintainable there against but the remedy for a eventuality of consent having been obtained forcefully or fraudulently or having been obtained by misrepresentation is, by applying to the same court. We do not find any reason why the said principle of law of general application should not follow qua decree of divorce by mutual consent when the grounds of appeal are on the basis of facts, which were not before the court which passed the consent decree. It is only the court which passed the consent decree which is capable of going into the said facts and if finds any prima facie merit therein, make inquiry by recording evidence with respect thereto and to thereafter take a final decision. Against such an order, an appeal may lie. We however do not deem it necessary to give a final opinion in this regard. However when the facts on which setting aside of a decree for divorce by mutual consent are pleaded in the appeal for the first time, it is not in the domain of the appellate court to enter into the inquiry into the said facts and if the same is done, would also deprive the parties of an important right of appeal, by converting the appellate court into a fact finding court.*

(emphasis supplied)

5. We are in full agreement with the decision of the Delhi High Court, and we find that the present case is squarely covered by the ratio laid down by the Delhi High Court in the aforesaid decision.

6. Faced with this situation, the learned advocate appearing on behalf of the Appellant sought leave to withdraw the above Appeal with liberty to approach the Family Court by filing an appropriate application raising her grievances before the Family Court as are raised in the present Appeal.

7. In these circumstances, we dismiss the above Family Court Appeal as withdrawn with liberty as prayed. However, there shall be no order as to costs.

8. In view of disposal of the above Family Court Appeal, nothing survives in the above Interim Application and the same is also disposed of accordingly.

9. We hasten to add that we have not opined on merits of the matter one way or the other. They are expressly kept open to be agitated before the Family Court in any Application that the Wife proposes to file for setting aside the Consent Decree. All contentions in that regard are expressly kept open.

10. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[SOMASEKHAR SUNDARESAN, J.]

[B.P.COLABAWALLA, J.]