

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 8 OF 2023
WITH
INTERIM APPLICATION NO. 676 OF 2023

Nidhi w/o Avinash Rai

..Appellant

V/s.

Avinash K. Rai

..Respondent

Ms. Niranjani Shetty for the Appellant.

Mr. J.A. Udaipuri i/b Udaipuri and Co. for the Respondent.

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

DATE : 3rd FEBRUARY 2023

P.C.

. By this Family Court Appeal, the Appellant (original Respondent) has impugned the judgment and decree dated 11.07.2022 passed by the Family Court, Thane, whereby allowing petition filed by the Respondent-husband partly and dissolving the marriage between the parties by decree of divorce on the ground of cruelty with effect from the date of decree and further directing that permanent custody of the daughter shall remain with the Appellant (original Respondent). The decree is challenged insofar the dissolution of marriage is granted by the Family Court.

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2. It is common ground that the impugned decree is passed *ex parte*. Mr. Udaipuri, the learned Counsel for the Respondent raised an issue of maintainability of this Family Court Appeal on the ground that remedy of the appellant would be to file an application under Order IX Rule 13 of the CPC before the Family Court for setting aside the ex-parte decree. He states that the Appellant will have to make out sufficient cause for setting aside the ex-parte decree.

3. Per contra, the learned Counsel for the Appellant states that the Appellant has been staying at Udipi, Karnataka and has not been served with any notices by the Family Court or by the Respondent and more particularly during the Covid-19 pandemic period, the Appellant could not remain present before the Family court when the petition filed by the Respondent was heard. She agrees to apply for setting aside the ex-parte decree before the Family Court under Order IX Rule 13 of CPC within two weeks from today.

4. Mr. Udaipuri, the learned Counsel for the Respondent on instructions states that his client would not take any steps of any nature whatsoever under the impugned Decree dated 11.07.2022 and would not remarry during the period of eight weeks from today. Statement is accepted.

5. We accordingly pass the following order.

(a) The Appellant to file an application before the Family Court within two weeks from today. The Respondent would be at liberty to file a reply to the application that would be filed by the Appellant within two weeks thereafter. The statement made by Mr. Udaipuri, the learned Counsel for the Respondent, is accepted.

(b) Family Court shall make an endeavour to dispose of the application that would be filed by the Appellant for setting aside the *ex-parte* decree within two weeks from the date of filing of such application.

(c) The Appellant would be at liberty to apply for stay of the decree dated 11.07.2022 before the Family Court, if the said application that would be filed by the Appellant is not decided within two weeks from the date of filing of the application by the Appellant.

(d) Both the parties to co-operate with each other and the Family Court in disposing of the application that would be filed by the Appellant within time prescribed.

(e) If any application is made for stay of the decree dated 11.07.2022 during the pendency of the application that would be filed by the Appellant, the said application to be considered by the Family Court on its own merits after hearing both the parties.

(f) It is made clear that this Court has not expressed any views on the merits of the impugned decree passed by the Family Court. All contentions of both the parties are kept open.

(g) Family Court Appeal is disposed of in the aforesaid terms.

(h) In view of the disposal of Family Court Appeal, nothing survives in the interim application and the same is disposed of. No order as to costs.

M.M.SATHAYE, J.

R.D.DHANUKA, J.