



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

939 FAMILY COURT APPEAL NO.104 OF 2023
WITH
CIVIL APPLICATION NO.14521 OF 2023
IN FCA/104/2023

Bibi Sadiya Mohammad Raju
@ Mohd. Javed Deshmukh,
Age 28 yrs., Occ. Household,
R/o Opposite Swaraj Tractor,
Jalgaon Road, Near Bharat Gas,
Sillod, Tq. Sillod, Dist. Aurangabad.

... Appellant

... Versus ...

Raju @ Mohammad Javed s/o Hamidmiya Deshmukh,
Age 36 yrs., Occ. Service,
R/o Wadhane, Tq. Sengaoon,
Dist. Hingoli.
At present Kazi Bag, Darga road,
Parbhani, Tq. & Dist. Parbhani.

... Respondent

...

Mr. Shaikh Mohammad Naseer, Advocate for appellant

Mrs. A.N. Ansari, Advocate for sole respondent

...

CORAM : SMT. VIBHA KANKANWADI &
S.G. CHAPALGAONKAR, JJ.

DATE : 11th JANUARY, 2024

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present appeal has been filed by the wife to challenge the *ex parte* Judgment and Decree of divorce passed by learned Judge, Family Court, Parbhani in Petition – A No.52/2023 on 12.10.2023. The said petition was filed under Section 2 of Muslim Personal Law (Shariat) Application Act, 1937 read with Section 7 of the Family Courts Act.

2 The original petition was filed by the present respondent – husband. The marriage between the original petitioner and respondent was solemnized on 26.04.2018 at Sillod, Dist. Aurangabad. After marriage they resided at Wadhone, Tq. Sengaoon. Their son is aged 3 now.

3 The husband is coming with a case that the wife is short tempered, arrogant and behaving in rude manner. On many occasions she had denied the sexual pleasure and when he asked her, she told that she does not like him. She was not willing to perform marriage with him. She insisted that the husband should reside separately from parents, otherwise she would commit suicide. She was also suspecting his character and she used to stay with her parents for long time. Whenever he used to go to fetch her, she used to insult and abuse him. The wife had picked up quarrels on 26.12.2021 when his parents had come to meet the grandson in their house

at Risod. According to the husband, the wife has left the house on 27.12.2021 on her own by taking all valuables, cash of Rs.2,00,000/- and the son. He had attempted to bring her back for cohabitation, however, she refused. The divorce has been sought on the ground of cruelty and desertion.

4 It appears from the record and the impugned Judgment that notice was served but it was observed by the trial Court that even after due service she failed to appear and, therefore, matter proceeded *ex parte*. Taking into consideration the evidence that was led by the husband, the impugned Judgment has been pronounced and the decree has been drawn.

5 Since copy of the entire record has been produced, the matter has been taken up for final hearing at the stage of admission with consent of both the parties.

6 Heard learned Advocate Mr. Shaikh Mohammad Naseer for the appellant and learned Advocate Mrs. A.N. Ansari for the respondent. In order to cut short, it can be said that both the learned Advocates have submitted their submissions in support of their respective contentions.

7 Taking into consideration the rival contentions following points arise for determination, findings and reasons for the same are as follows.

Sr. Nos.	POINTS	FINDINGS
01	Whether the decision of the trial Court to proceed the matter <i>ex parte</i> was legal ?	No.
02	Whether interference is required ?	Yes. By partly allowing the appeal, the matter is remanded.

REASONS

8 The photocopy of certified copy of the service report has been produced. It appears that the Bailiff of Sillod Court had gone to effect service of summons on the respondent. He has stated in the report that when he went to the house as shown by the witness, he knocked the door of the house and called the name of the wife, but nobody appeared and, therefore, he pasted the copy of the summons on the conspicuous part of the door of the house. According to us, this is totally illegal service of summons. The first and the foremost fact ought to have been borne in mind by the Bailiff is that the lady on whom he was asked to serve the notice was a *pardanashin* lady and, therefore, all the precautions ought to have been taken. Further, it appears that he knocked the door and nobody came. Unless order V Rule 16 of the Code of Civil Procedure requires that the serving officer should tender

a copy of the summons to the defendant personally, or to an agent and then should take the acknowledgment i.e. the signature or the thumb mark in acknowledgment of receipt of the summons, then Order V Rule 17 of the Code of Civil Procedure prescribes for the procedure when defendant refused to accept the service or cannot be found. In respect of the defendant who is not found at the time the serving officer goes, then the second part of the Order V Rule 17 of the Code of Civil Procedure would come into play. Only when the defendant who is absent from his residence and there is no likelihood of his being found at the residence within a reasonable time, then only the serving officer is supposed to affix a copy of the summons on the outer door. The copy of the roznama would show that the learned trial Judge has acted hastily and even when the summons/notice had not received; yet allowed application Exh.15, which was for affixing the notice on the conspicuous part of the door of the respondent. He failed to consider that Order V Rule 20 of the Code of Civil Procedure which provides for the substituted service would come into play only when the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that, for any other reason the summons cannot be served in ordinary way, then affixing the copy of the same can be allowed. Here, the roznama absolutely does not show that notice which was sent for serving on the wife had ever returned and there was any evidence

before the learned trial Judge to come to a conclusion that the wife was avoiding to receive the notice/summons. The order of proceeding the matter *ex parte* is, therefore, erroneous. He failed to consider that the lady was *pardanashin* and, therefore, ought to have taken precautions to see whether exactly where she was residing and there should have been a proper service.

9 Another fact to be noted is that it appears that the learned trial Judge has not considered the Division Bench decision of this Court in **Dagdu Chhotu Pathan vs. Rahimbee Dagdu Pathan** [2002 (3) Mh.L.J. 602] to see that there are efforts of reconciliation before accepting the plea of talaaq.

10 We feel that no proper opportunity was given to the appellant to contest the matter and, therefore, it deserves to be remanded. Hence, the following order.

ORDER

1 The appeal stands partly allowed.

2 The Judgment and Decree passed by the learned Judge, Family Court, Parbhani in Petition – A No.52/2023 dated 12.10.2023 is hereby set aside.

3 The petition is restored on the File of learned Judge, Family Court, Parbhani.

4 The appellant should appear before the learned trial Judge on 01.02.2024. In case of failure on the part of appellant to appear, learned trial Judge to issue notice to her and on her appearance give opportunity to her to file written statement as per the provisions of law and thereafter to decide the matter as per the procedure of law.

5 The learned trial Judge to expedite the proceedings and complete the proceedings and decide it within six months from today.

6 Civil Application stands disposed of.

(S.G. CHAPALGAONKAR, J.)

(SMT. VIBHA KANKANWADI, J.)

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