HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO.56 OF 2018

Kamod Shrihari Deshpande,
Age : 34 years, Occu. Private Service,
R/o C/o. S.B. Hiremath, Plot No.726,
Waluj, Taluka & District Aurangabad. … **Appellant**.

Versus

Madhuri W/o Kamod Deshpande,
Age : 32 years, Occu. Household,
R/o At present Bhokar, Taluka Bhokar,
District Nanded. … **Respondent**.

...
Advocate for Appellant : Mr. L. Ravichandra (Senior Advocate)
i/b Mr. S.S.Chapalgaonkar.
Advocate for Respondent : Mr. S.R.Deshpande.
...

WITH

CIVIL APPLICATION NO.10488 OF 2018
IN
APPEAL FROM ORDER NO.56 OF 2018

Kamod Shrihari Deshpande,
Age : 34 years, Occu. Private Service,
R/o C/o. S.B. Hiremath, Plot No.726,
Waluj, Taluka & District Aurangabad. … **Applicant**.

Versus

Madhuri W/o Kamod Deshpande,
Age : 32 years, Occu. Household,
R/o At present Bhokar, Taluka Bhokar,
District Nanded. … **Respondent**.

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HIGH COURT OF JUDICATURE AT BOMBAY

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Advocate for Applicant : Mr. L. Ravichandra (Senior Advocate)
i/b Mr. S.S.Chapalgaonkar.
Advocate for Respondent : Mr. S.R.Deshpande.

...

CORAM : V. K. JADHAV, J.
DATE : 11.03.2020

ORDER :-

1. The appellant is the original plaintiff. Being aggrieved by the order dated 16.04.2018 in Regular Civil Appeal No.549 of 2012 passed by the learned District Judge, Aurangabad thereby reversing the judgment of dissolution of marriage, dated 02.11.2012 in Hindu Marriage Petition No.114 of 2011 passed by the learned Joint Civil Judge Junior Division, Aurangabad, the appellant-original plaintiff prefers this appeal from order.

2. The appellant-plaintiff had instituted Hindu Marriage Petition No.114 of 2011 under Section 13(i)(a), 13(1)(iii), 13(i-b) of the Hindu Marriage Act, 1955. It has been recorded in the judgment that the respondent-wife was duly served with notice vide report Exh.7 but failed to appear. The petition thus proceeded *ex-parte*. By judgment and order dated 02.11.2012,

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HIGH COURT OF JUDICATURE AT BOMBAY

the 4th Joint Civil Judge Senior Division, Aurangabad allowed the petition and thereby declared the marriage between the petitioner and the respondent to have been dissolved under Section 13(i)(i-b) of the Hindu Marriage Act. Being aggrieved by the same, the respondent herein has preferred Regular Civil Appeal No.549 of 2012. The learned Principal District Judge, Aurangabad, by impugned judgment and order dated 16.04.2018, allowed the appeal with costs, set aside the judgment and decree passed by the Trial Court and remanded the matter to the Trial Court with directions about appointment of guardian / next friend for the respondent-wife and thereafter the petition to be disposed off in accordance with law by giving opportunity to the respondent-wife to submit a written statement. It has also been directed that both the parties be given an opportunity to adduce evidence afresh. Hence, this appeal against the said order.

3. The learned senior counsel for the appellant submits that the District Court has no jurisdiction to entertain the appeal. The learned senior counsel submits that Section 3 of the Family Courts Act, 1984 mandates every State to have a separate Family Court. The learned senior counsel submits that for

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HIGH COURT OF JUDICATURE AT BOMBAY

trying any issue relating to matrimonial dispute, the designated Court would be the Family Court having jurisdiction over the local limits. It is further submitted that the appellant-husband's address being at CIDCO, Waluj, the original petition for dissolution of marriage was filed before the concerned Senior Division Court, who had territorial jurisdiction over the issue. However, any court that takes up any matter concerning matrimonial dispute, shall automatically assume the role of a Family Court. The learned senior counsel submits that in terms of Section 19 of the Family Courts Act of 1984, an appeal from any order passed by the Family Court (not being an interlocutory order) shall lie to the High Court. The learned senior counsel submits that it is clear from the language of Section 19 that the Civil Procedure Code or other laws are not applicable. It is thus submitted that the respondent-wife should have filed the appeal only before the High Court and not before the District Court. The learned senior counsel submits that otherwise also, when the respondent-wife was duly served, there was no reason to remand the matter to the Trial Court.

4. The learned senior counsel appearing for the appellant

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HIGH COURT OF JUDICATURE AT BOMBAY

in order to substantiate his contentions placed his reliance on following cases :

(i) Dr. Jagmittar Sain Bhagat Vs. Dr. Health Services, Haryana and others reported in AIR 2013 Supreme Court 3060.

(ii) Sushilkumar Metha Vs. Gobind Ram Bohra reported in 1990 SCC (1) 193.

(iii) Smt. Laxmibai Vs. Keshrimal Jai reported in AIR 1986 Madhya Pradesh 138.

(iv) Bhanu Kumar Jain Vs. Archana Kumar and another reported in AIR 2005 Supreme Court 626.

5. The learned counsel for the respondent-wife submits that the appellant-husband has given his address as C/o. S.B.Hiremath, plot No.726, Waluj. The learned counsel for the respondent-wife submits that in the appeal before the First Appellate Court preferred by the respondent-wife, the learned District Judge has issued notice to the appellant-husband and it appears from the report of the bailiff, which is submitted along with the affidavit-in-reply, that the bailiff has contacted the Police Patil of village Gram Panchayat, Waluj and it was found that the appellant-husband is not residing on the given

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HIGH COURT OF JUDICATURE AT BOMBAY

address. The learned counsel submits that apart from the same, it is clear that the appellant-husband is not residing in the city or town area. The learned counsel submits that the Government of Maharashtra, in consultation with the High Court of Judicature at Bombay, issued a Notification dated 15.02.1993 about establishment of Family Court at Aurangabad and specified the local limits of the area of jurisdiction of the Family Court, Aurangabad as given below :

(i) the area comprising the Municipal Corporation of the City of Aurangabad,

(ii) the area under the jurisdiction of the City and Industrial Development Corporation, Aurangabad.

(iii) the area under the jurisdiction of the Aurangabad Cantonment Board.

6. The learned counsel submits that the address as given by the appellant-husband, if considered as it is, the same does not fall in the above three categories.

7. The learned counsel submits that, furthermore, in terms of the provisions of Section 28(1) of the Hindu Marriage Act, 1955, the appeal shall ordinarily lie from the decisions of the Court. In terms of Section 8 of the Maharashtra Civil Courts

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HIGH COURT OF JUDICATURE AT BOMBAY

Act, the District Court shall be the Court of Appeal from all decrees and orders passed by the subordinate Courts from which an appeal lies under any law for the time being in force. The learned counsel for the respondent-wife submits that the learned District Judge has therefore rightly entertained the appeal and passed the order which is impugned in this Appeal from Order. The learned counsel for the respondent-wife submits that the learned District Judge in paragraph No.10, by giving reference to the pleadings of the appellant-husband in the original petition, observed that it is his case that the marriage is void as respondent-wife was incapable of giving valid consent as she was suffering from serious mental disorder. It it also contended in the petition that the marriage between them is *void-ab-initio* as fraud was practiced by the respondent-wife and her parents. It is also contended that the respondent-wife is suffering from serious mental disorder and has been incurably of unsound mind. The learned counsel submits that the District Judge has therefore, rightly pressed the need for appointment of a guardian or next friend for defending the respondent-wife in terms of Order 32 Rule 15 of the Civil Procedure Code. The learned counsel submits that

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HIGH COURT OF JUDICATURE AT BOMBAY

the impugned order is proper, correct and legal, and calls for no interference. There is no substance in the Appeal from Order and the appeal is liable to be dismissed.

8. The learned counsel for the respondent in order to substantiate his contentions placed his reliance on following two cases :

(i) Madhavi Madhukar Kulkarni Vs. Madhukar Ramchandra Kulkarni reported in AIR 1984 Bombay 239.

(ii) Gangadhar Rakhamaji Vs. Manjulal Gangadhar reported in AIR 1960 Bombay 42.

9. So far as Section 3 of the Family Courts Act, 1984 is concerned, it mandates every State to have a separate Family Court. Section 3 of the Family Courts Act, 1984 reads as under:

> "3. Establishment of Family Courts.-
>
> (1) For the purpose of exercising the jurisdiction and powers conferred on a Family Court by this Act, the State Government, after consultation with the High Court, and by notification, -
>
> (a) shall, as soon as may be after the commencement of this Act, establish for every area in the State comprising

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HIGH COURT OF JUDICATURE AT BOMBAY

city or town whose population exceeds one million, a Family Court;

(b) may establish Family Courts for such other areas in the State as it may deem necessary.

(2) The State Government shall, after consultation with the High Court, specify, by notification, the local limits of the area to which the jurisdiction of a Family Court shall extend and may, at any time, increase, reduce or alter such limits."

10. The learned counsel for the respondent-wife has placed on record a copy of the notification Exh.R-2 and on perusal of the same it appears that in terms of Section 3, Sub Section (2), the State Government after consultation with the High Court, issued the notification specifying the local limits of the area of the jurisdiction of the Family Court, Aurangabad. On careful perusal of the judgment and order passed by the Trial Court in Hindu Marriage Petition No.114 of 2011, it appears that the appellant-husband himself has mentioned his address as C/o S.B.Hiremath, Plot No.726, Waluj, District Aurangabad. It further appears from the report of the bailiff, as pointed out by the learned counsel for the respondent-wife, submitted before the District Court that the bailiff had been to village Waluj to serve the notice on the appellant-husband and approached the

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HIGH COURT OF JUDICATURE AT BOMBAY

Police Patil of the Village. Though service of the notice could not be carried out however, as per the address given by the appellant-husband himself, his residence is located within the area of the Gram Panchayat, Waluj. It is thus clear that the area as mentioned by the appellant-husband does not fall within the three categories as specified in the notification dated 15.02.1993. Moreover, considering the same, the appellant-husband had filed his Hindu Marriage Petition No.114 of 2011 before the Civil Judge, Senior Division, Aurangabad and not before the Family Court. It also appears that the appellant-husband had not raised this issue before the District Judge in the appeal preferred by the respondent-wife. This issue has been raised for the first time in this appeal against the order. Apart from that, in view of the discussion above, if the appellant-husband's address does not fall under the categories as specified in the notification, I find no substance in the submissions made on behalf of the appellant-husband that the appellant's address is at CIDCO, Waluj and as such, even if the petition is filed before the concerned Senior Division Court, who had territorial jurisdiction over the issue, the said Senior Division Court while dealing with the

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HIGH COURT OF JUDICATURE AT BOMBAY

matrimonial dispute, shall automatically assume the role of a Family Court.

11. The Appeal against the decree passed by the Senior Division Court in the present case would lie to the District Court in terms of the provisions of Section 28(1) of the Hindu Marriage Act read with Section 8 of the Maharashtra Civil Courts Act. Section 28 of the Hindu Marriage and Section 8 of the Maharashtra Civil Courts Act read as under :

> "**28. Appeals from decrees and orders**.-
>
> (1) All decrees made by Court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the Court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in the exercise of its original civil jurisdiction.
>
> (2) Orders made by the Court in any proceedings under this Act, under Section 25 or Section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in exercise of its original civil jurisdiction.
>
> (3) There shall be no appeal under this section on subject of costs only.
>
> (4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order."

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HIGH COURT OF JUDICATURE AT BOMBAY

> "**8. Appellate jurisdiction of District Court.** - Except as provided in sections 16, 17 and 26 the District Court shall be the Court of Appeal from all decrees and orders passed by the subordinate Courts from which an appeal lies under any law for the time being in force."

12. In view of the provisions as reproduced herein above, the District Court shall be the Court of Appeal for all the decrees and orders passed by the subordinate Courts from which an appeal lies and as such the learned District Judge has rightly entertained the appeal. In addition to this, even by notification No.HMA.1055/52067 published in the Official Gazette on 01.09.1955, the Courts of the Civil Judges, Senior Division, in the State have been notified as having jurisdiction in respect of the matters dealt with in the Hindu Marriage Act within their territorial jurisdictions. I do not find any substance in the submissions made on behalf of the appellant-husband that the learned District Judge has entertained the appeal without any jurisdiction.

13. In a case of Dr. Jagmittar Sain (*supra*) relied upon by the learned senior counsel appearing for the appellant-husband, the Supreme Court has observed that the issue of jurisdiction

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HIGH COURT OF JUDICATURE AT BOMBAY

goes to the root of the matter and can be raised at any stage and the doctrine of waiver does not apply. In the instant case, though the appellant-husband has raised the issue of jurisdiction for the first time before this Court, however, submissions are considered on merits in the light of the notification and the circular, as detailed herein above.

14. In a case of Sushilkumar Mehta (*supra*) relied upon by the learned senior counsel appearing for the appellant-husband, it is held that a decree passed by a Court without jurisdiction over a subject matter or on other grounds which goes to the root of its exercise of jurisdiction, lacks inherent jurisdiction and a decree passed by such Court is a nullity and is *non est*. There is no dispute about this proposition. The effect of the jurisdiction cannot be cured by consent or waiver of the party. However, in the instant case, I do not think that either the Civil Court has passed the order without jurisdiction or the learned District Judge has entertained the appeal against the said decree without having any jurisdiction.

15. In a case of Kiran Singh (*supra*) relied upon by the learned senior counsel for the appellant-husband, the Supreme

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HIGH COURT OF JUDICATURE AT BOMBAY

Court has held that a decree passed by the learned Trial Court without jurisdiction and also held that it is a fundamental principle that a decree passed by a Court is without nullity.

16. In a case of Smt. Laxmibai (*supra*) relied upon by the learned senior counsel for the appellant-husband, the Madhya Pradesh High Court held that an appeal against the ex-parte decree, cannot be converted into a proceeding for setting aside the ex-parte decree. Madhya Pradesh High Court held that in an appeal under Section 28 of the Hindu Marriage Act against the ex-parte decree, the appellant cannot be allowed to show that he was prevented by any sufficient cause from appearing at the hearing. In the instant case, it appears from the observations made by the learned District Judge that in terms of the provisions of Order 32 Rule 15 of the Civil Procedure Code, primarily the learned District Judge thought it necessary to remand the matter. Thus, the observations made by the Madhya Pradesh High Court cannot be made applicable to the facts and circumstances of the present case.

17. In a case of Bhanu Kumar Jain (*supra*) relied upon by the learned senior counsel, here again the issue of ex-parte

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HIGH COURT OF JUDICATURE AT BOMBAY

decree and the remedies available against the same are discussed.

18. On careful perusal of the judgment and order passed by the learned District Judge, it appears that the matter is not remanded on the ground that the respondent-wife had not been duly served. In Paragraph No.10 of the judgment, the learned District Judge, by giving reference to the pleadings of the appellant-husband in the petition, observed that it is the case of the appellant-husband that the respondent-wife is incapable of giving her valid consent as she was suffering from serious mental disorder and she has been incurably of unsound mind. It has also been contended that the marriage between them is *void-ab-initio* as fraud was practiced by the respondent-wife and her parents. It appears from the judgment and decree passed by the trial court in the original proceedings that no guardian or next friend was appointed for defending the respondent. Furthermore, in paragraph No.25 of the judgment, the learned District Judge has further observed that the respondent-wife, though presented the appeal through the advocate, appeared in person and submitted the written notes of arguments and at the time of

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HIGH COURT OF JUDICATURE AT BOMBAY

making submissions she made grievances as to how her father, who happens to be an advocate, has cheated her, and though at the time of making submissions, she found to be normal, however, there were certain indications of assertive and aggressive attitude. The learned District Judge has therefore observed that the impugned judgment suffers from illegality, as the learned trial Judge did not appoint guardian or next friend so as to enable the respondent-wife to properly defend the divorce petition. In the light of these observations and considering the pleadings of the appellant-husband himself, I do not find any fault in the impugned order of remand. It further appears from the conduct of the appellant-husband, as observed by the learned District Judge in paragraph No.16 of the judgment, that after 3 months and 9 days of the judgment and decree passed by the Trial Court, the appellant-husband has contracted the marriage.

19. In a case of Gangadhar Rakhamaji (*supra*) relied upon by the learned counsel for the respondent, the Division Bench of this Court (Coram : Mohit S. Shah and V. S. Desai, JJ.) by referring the said notification published in the Official Gazette on 01.09.1955, held that the Court of Civil Judge, Senior

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HIGH COURT OF JUDICATURE AT BOMBAY

Division, which is notified by the State Government as having jurisdiction in the matters dealt with under the Hindu Marriage Act, so also the forum of appeal from the order or decree of the Court of Civil Judge Senior Division under the Bombay Civil Courts Act is the Court of the District Judge of the District. The Divisional Bench of this Court has further observed that therefore, in the present case, which was decided by the Civil Judge, Senior Division, the appeal lies to the District Judge and not to the High Court.

20. In a case of Madhavi Kulkarni (*supra*) relied upon by the learned counsel for the respondent, the Division Bench of this Court (Coram : Dharmadhikari and Kotwal JJ.) held that whenever in a petition under the Hindu Marriage Act a decree is passed by a Court of Civil Judge Senior Division an appeal lies to the District Court and when a decree is passed by the Assistant Judge, then the appeal will lie to the High Court, since the Assistant Judge is part and parcel of the District Court.

21. In the light of the observations made in the cited cases and in view of the discussion above, I do not find any merit in

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HIGH COURT OF JUDICATURE AT BOMBAY

this appeal. Hence, I proceed to pass the following order :

ORDER

(i) Appeal from Order is hereby dismissed.

(ii) The learned District Judge has directed the parties to appear before the Trial Court on 21.06.2018 in addition to the directions given in the remand order. The said date is now specified as 08.04.2020. The Trial Court shall dispose off the Hindu Marriage Petition as expeditiously as possible, preferably within a period of six (6) months from the date of the appearance of the parties before the Trial Court.

(iii) In view of dismissal of the Appeal from Order, nothing survives in the pending Civil Application. Civil Application is accordingly disposed off.

(V. K. JADHAV, J.)

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