Bombay High Court
Mrs. Pranjali Prasanna Bingi vs Mr. Prasanna Anantrao Bingi & Anr on 9 April, 2010
Bench: A.S. Oka

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7931 OF 2009

Mrs. Pranjali Prasanna Bingi. .. Petitioner

Vs

Mr. Prasanna Anantrao Bingi & Anr. .. Respondents

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Ms Tanmayi Gadre h/f Shri N.P. Deshpande for the Petitioner

Shri Vivek Salunke for the Respondent no.1

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WITH
WRIT PETITION NO. 7977 OF 2009

Mrs. Pranjali Prasanna Bingi. .. Petitioner

Vs

Mr. Prasanna Anantrao Bingi .. Respondent

Ms Tanmayi Gadre h/f Shri N.P. Deshpande for the Petitioner

Shri Vivek Salunke for the Respondent

CORAM : A.S.OKA, J.

DATE : 9TH APRIL, 2010

ORAL JUDGMENT :

. Notice for final disposal was issued by this Court.

Accordingly, the submissions of the parties were heard on the earlier date.

The Petitioner - wife filed a Petition in the Family Court seeking a decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the said Act."). The decree was sought on the ground of cruelty. A Written Statement was filed by the Respondent-

husband in which he made a counter-claim for passing a decree of divorce on the ground incorporated in Section 13(1)(ia) as well as Section 13(1-A)

(ii) of the the said Act. An order was passed on 20 th May, 2009 by the Learned Judge of the Family Court. The operative part of the order reads thus: -

> "i. The Court shall follow Order XII Rule 6 of C.P.C.
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> and shall pass a decree for divorce in favour of both the parties. The case shall proceed further with respect to the claims in dispute.
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> ii. Any party aggrieved by this order and desires to approach the Hon'ble High Court may inform this Court and seek time for the same. It shall be granted.

iii. The parties to note this order."

2. An application was made by the Petitioner -wife to the Learned Principal Judge, Family Court, for transfer of the Petition for divorce to any other Court. The said application for transfer was made on the basis of the observations made by the Learned Judge in the order dated 20th May, 2009. The application for transfer was rejected by the learned Principal Judge of the Family Court on the

ground that the Learned Principal Judge has no authority to transfer a Petition. The Writ Petition No.7931 of 2009 has been filed for challenging the order dated 24th July, 2009 by which the application for transfer was rejected and the Writ Petition No.7977 of 2009 has been preferred for challenging the order dated 20th May, 2009 by which the Petition was ordered to be fixed for passing a decree on admission. It must be noted here that an attempt was made by this Court to work out settlement by calling both the parties to chamber . However, the said attempt was unsuccessful.

3. The learned counsel appearing for the Petitioner in support of both the Petitions submitted that the Petitioner and the Respondent had sought divorce on the ground of cruelty on separate set of facts and therefore, Rule 6 or Order XII of the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code") has no application. The learned counsel appearing for the Petitioner submitted that in view of Section 23 of the said Act, without recording satisfaction that the ground for passing a decree of divorce exists, a Court dealing with a Petition for divorce cannot pass a decree of divorce. The submission of the learned counsel is that the order directing that the petition should be placed for passing a decree on admission is illegal and without jurisdiction. The learned counsel appearing for the Petitioner further submitted that the Learned Judge of the Family Court had jurisdiction to transfer a pending petition from one Court to another. She invited my attention to the order passed on 20th May, 2009. She submitted that there is a reasonable basis for the apprehension expressed by the Petitioner that she may not get justice from the Learned Judge of the Family Court before whom the Petition is pending.

4. The learned counsel appearing for the Respondent- husband raised a preliminary objection to the maintainability of the Writ Petition No.7977 of 2009 where the challenge is to the order dated 20 th May, 2009.

He submitted that the Court has already issued a direction for passing a decree on admission and only the ministerial act of drawing a decree has not been carried out on account of stay granted by this Court. He submitted that a remedy of an appeal under Section 19(1) of the Family Court Act, 1984 (hereinafter referred to as "the Family Court Act") is available to the Petitioner. He submitted that writ jurisdiction cannot be exercised when a statutory remedy of appeal is available in as much as there is already a direction issued that a decree shall be passed. He invited my attention to the decision of the Karnataka High Court in the case of Smt. Shaymala Bai & Ors. vs. Smt. S. Saraswathi Bai & Ors., [1996 AIHC 5050].

5. I have given careful consideration to the submissions. From the clause (i) of the operative part of the impugned order dated 20 th May, 2009, it is crystal clear that the Court has not purported to pass a decree.

Clause (ii) of the operative part of the said order records that if any party is aggrieved by the said order and desires to approach this Court, the party may seek time which shall be granted by of the Family Court. Thus, it is obvious that as of today there is no decree of divorce passed by the learned Judge under Rule 6 of Order XII of the said Code and only a direction has been issued to follow the procedure order under Rule 6 of Order XII of the said Code. Therefore, there is no decree passed

against which an appeal can be preferred. It is true that against all the orders which are not of interlocutory nature, an appeal is provided under Section 19(1) of the Family Court Act,1984. Perusal of the impugned order shows that no adjudication has been made on the rights of the parties and the ultimate direction issued is only of procedural nature of following the procedure under Rule 6 of Order XII of the said Code for passing a decree of divorce. Therefore, it cannot be said that a remedy of statutory appeal is available for challenging the said order dated 20th May 2009. In the circumstances, the preliminary objection raised by the husband has no merit. The decision of the Karnataka High Court relied upon by the learned counsel appearing for the respondent will not help the respondent. The said decision lays down that a decree on admission passed in exercise of powers under rule 6 of Order XII of the said Code is a decree against which an appeal is maintainable. In the present case, the Family Court has not passed a decree, but a direction has been issued to follow rule 6 of Order XII of the said Code. The said direction has been stayed by interim order of this Court.

6. It cannot be disputed that both the husband and the wife had sought a decree of divorce on the ground of cruelty on totally a different set of allegations. On plain reading of the pleadings of the parties, it is obvious that the Petitioner has not admitted what is alleged in the counter-claim of the Respondent and the Respondent has not admitted the facts alleged in the Petition filed by the Petitioner-wife. It will be interesting to note the reasons recorded by the Trial Judge. The reasons can be summarized as follows:-

(i) Both the parties are claiming divorce on the ground of cruelty.

(ii) Both the parties are claiming divorce. Therefore, efficacious remedy is available under section 13-B of the said Act. But the above provision is not followed and thus there is abuse of process of law as the parties are not taking recourse to efficacious remedy and are fighting the matter only for their personal vengeance.

(iii) There are large number of documents on record. All the documents are placed on record only for the relief which is claimed by both the parties. Thus there is wastage of energy , time and manpower.

(iv) There is a possibility of causing harm to the parties in dealing the case on merits. Because if parties fail to prove their case, then it may be dismissed. The parties will be deprived of their claim of divorce.

Thus, there is danger in proceeding with the matter on merits.

(v) By following Rule 6 Order XII of the said Code, the ultimate decision would be a divorce which is sought for by both the parties.

(vi) The Court does not understand as to what separate benefit would the Petitioner get by a decision on merits and there is likelihood of hazard in dealing the matter on merits.

7. The reasons recorded are not at all satisfactory and such reasons could not have been recorded by a Family Court. After having perused the impugned order and after considering the submissions made by the learned counsel appearing for the parties, I am constrained to observe that the learned Judge has completely overlooked the relevant provisions of the said Act. Most importantly the learned Judge has completely ignored the Section 23 of the said Act and in particular clause

(a) of Sub-section (1) thereof which reads thus:-

> "23. Decree in proceedings.--(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that -
>
> (a) any of the grounds for granting relief exists and the petitioner 1[except in cases where the relief is sought by him on the ground specified in sub- clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of Section 5] is not in anyway taking advantage of his or her own wrong or disability for the purpose of such relief, and .....
>
> ...

Before passing any decree of divorce on any of the grounds incorporated under the Act, whether a Petition is defended or not, the Court has to record a satisfaction that the grounds for granting relief exist.

The Apex Court had an occasion to interpret the said provision way back in the year 1965 in the case of Mahendra Manilal Nanavati v Sushila Mahendra Nanavati, [AIR 1965 SC 364]. The Apex Court was dealing with a case where the Petition was filed under Section 12 of the said Act for annulment of the marriage. While dealing with the case on merits, the Apex Court has extensively considered the scheme of the Act and has held that the Court under the said Act gets jurisdiction to pass a decree only if the satisfaction as contemplated by Section 23 is recorded. The Apex Court also considered provision of Rule 5 of Order VIII of the said Code which deals with the consequences of not filing the Written Statement.

The Apex Court also referred to Rule 6 of Order XII of the said Code which allows a party to apply to the Court for judgment based on admission. In Paragraph 25 of its judgment , the Apex Court has held thus:-

> "25. Section 23 of the Act requires the Court to be satisfied on certain matters before it is to pass a decree. The satis- faction of the Court is to be on the matter on record as it is on that matter that it has to conclude whether a certain fact has been proved or not. The satisfaction can be based on the admissions of the parties. It can be based on the evidence, oral or documentary, led in the case. The evid- ence may be direct or circumstantial.
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> In Arnold v. Arnold Woodroffe, J., said:

"In the present case admissions have been proved. Doubtless, caution is required in cases of divorce to see that there is no collusion and an admission must be examined from this point of view. But if, as here, there is no reason to suspect collusion an admission may be as cogent evidence in these as in any other cases. In Robinson v. Robinson (1859 1 Sw. & Tr. 362), Sir Alexander Cockburn says: The Divorce Court is at liberty to act and is bound to act on any evidence legally admissible by which the fact of adultery is established. If, therefore, there is evidence not open to exception of admissions of adultery by the principal respondent, it would be the duty of the Court to act on these admissions although there might be a total ab- sence of all other evidence to support them. The admission of a party charged with a criminal or wrongful act, has at all times and in all systems of jurisprudence been considered as most cogent and conclusive proof; and if all doubt of its genu- ineness and sincerity be removed, we see no reason why such a confession should not, as against the party making it, have full effect given to it."

(Emphasis added) The Paragraphs 27 and 28 of the said decision read thus:-

"27. The aforesaid rule of prudence loses its importance when certain provisions of the Act enjoin upon the Court to be satisfied with respect to certain matters which would enable the Court to avoid passing a decree on collusive admissions. Section 12(2)(b) provides that no petition for the annulment of the marriage shall be entertained unless the Court be satisfied that the petitioner was at the time of marriage ignorant of the facts alleged and that no marital intercourse with the consent of the petitioner had taken place since his discovering the existence of the grounds for the decree. Such a finding necessarily implies that before reaching it the Court has satisfied itself that there had been no connivance of the petitioner in the coming into existence of the ground on which he seeks annulment of the marriage. Besides, Section 23 also provides that the Court can pass a decree only if it is satisfied that any of the grounds for granting relief exists, that the petition is not presented or prosecuted in collusion, with the respondent and that there was no legal ground on which the relief claimed could not be granted. In these circumstances, it would be placing undue restriction on the Court's power to determine the facts in issue on any particular type of evidence alone, specially when there be no such provision in the Act which would directly prohibit the Court from taking into account the admissions made by the parties in the proceedings.

28. We are of opinion that in proceedings under the Act the Court can arrive at the satisfaction con- templated by Section 23 on the basis of legal evid-

ence in accordance with the provisions of the Evid- ence Act and that it is quite competent for the Court to arrive at the necessary satisfaction even on the basis of the admissions of the parties alone. Admissions are to be ignored on grounds of prudence only when the Court, in the circum- stances of a case, is of opinion that the admissions of the parties may be collusive. If there be no ground for such a view, it

would be proper for the Court to act on those admissions without forcing the parties to lead other evidence to establish the facts admitted, unless of course the admissions are contradicted by the facts proved or a doubt is cre- ated by the proved facts as regards the correctness of the facts admitted."

(emphasis added)

8. Thus, what has been held by the Apex Court is that in the proceedings under the said Act, the Court can arrive at the satisfaction contemplated by Section 23 on the basis of legal evidence in accordance with the provisions of the Evidence Act and also it is quite competent for the Court to arrive at a necessary satisfaction even on the basis of the admissions of the parties. In the present case, there is no evidence adduced by the parties as of today. As far as the admissions in pleadings are concerned, even the Trial Court in paragraph 10 of the impugned judgment has observed that there is no admission of facts by the rival parties in their pleadings, but they are claiming the same relief of divorce.

On this aspect, it will be also necessary to consider a decision of the Apex Court of Balwinder Kaur vs. Hardeep Singh [(1997)11 SCC 701]. This was a case where the matter arose out of an ex parte decree of divorce under the said Act. In Paragraph 15, the Apex Court held thus:

"15. Section 23 of the Hindu Marriage Act mandates the court before granting decree for divorce, whether defended or not to satisfy itself (1) if the grounds for claiming relief exist and the petitioner is not taking advantage of his or her own wrong or disability for the purpose of such relief and (2) the petitioner has not in any manner been accessory to or con- nived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty. A duty is also cast on the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. Under sub-section (3) of Section 23 of the Act, the court can even refer the matter to any person named by the parties for the purpose of reconciliation and to adjourn the matter for that purpose. These objectives and principles govern all courts trying matrimonial matters. The judgment of the District Judge is silent if the learned Judge took into con- sideration all what is mentioned in Section 23 of the Act. A question also arises: can a party defeat the provisions of sub- section (2) and sub-section (3) of Section 23 of the Act by re- maining ex parte and the court is helpless in requiring the pres- ence of that party even if in the circumstances of the case so required. We are of the opinion that the court can in such a situation require the personal presence of the parties. Though the proceedings were ex parte in the case like this the court cannot be a silent spectator and it should itself endeavour to find out the truth by putting questions to the witnesses and eliciting answers from them."

(Emphasis added) In fact, the Apex Court went to the extent of holding that the Court cannot be a silent spectator and it should itself endeavour to find out the truth by putting questions to the witnesses and eliciting answers from them.

9. The Apex Court has time and again made it clear that irretrievable break down of marriage is no ground for passing a decree of divorce under the said Act. However, in the facts and circumstances of the case, such powers can be exercised by the Apex Court in its jurisdiction under Article 142 of the Constitution of India. Therefore, there is no power vesting in the Family Court to pass a decree only on the ground of irretrievable breakdown of marriage. .

10. Thus, sum and substance of the discussion is that the impugned order has been passed by completely ignoring the Section 23 of the said Act. The learned judge has not at all recorded satisfaction that a ground under the said Act exists for passing a decree. Merely because both the parties have prayed for the same relief of divorce on the basis of different set of facts, the Court does not get jurisdiction to pass a decree under Rule 6 of Order XII of the said Code. In a given case, on the basis of the admissions, the Court is not debarred from exercising power under Rule 6 Order XII of the said Code but before doing that exercise, the Court will have to follow mandatory provision of clause (a) of Sub-section (1) of Section 23 of the said Act and record satisfaction which is a condition precedent for passing a decree of divorce. Moreover, in the present case there are no admissions by the parties Therefore, the direction of the learned Trial Judge for keeping the petition passing a decree under Rule 6 of Order XII of the said Code is completely illegal and deserves to be quashed and set aside.

11. As far as a prayer for transfer is concerned, by reading the order impugned in the Writ Petition No.7977 of 2009, it is impossible to come to a conclusion that the learned Judge has prejudice against any of the parties. At the highest, what can be said is that the learned Judge has passed an order which turns out a completely erroneous order. However, that is no ground to pass an order of transfer. A question regarding the power of the Principal Judge of the Family Court to transfer the matter need not be considered in this case. No ground has been made out for passing an order of transfer. It is obvious that in view of this judgment, the concerned Court is bound to scrupulously follow the provision of the said Act and in particular Section 23 thereof.

12. Hence, the Petitions are disposed of by passing the following order.

(a) Writ Petition No. 7977 of 2009 is allowed and the impugned order passed by the learned Judge of the Family Court dated 20th May, 2009 is quashed and set aside.

(b) The pending Petition shall be disposed of by the learned Trial Judge in accordance with law as expeditiously as possible.

(c) The Writ Petition No.7931 of 2009 is rejected.

(d) There will be no orders as to costs.

(A.S.OKA, J)