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SA-284-18

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 284 OF 2018
WITH
CIVIL APPLICATION NO. 5300 OF 2018

Seema Ambadas Khedkar
Age-20 yrs, Occup- Household,
R/o c/o Baban Bhaguji Jayebhaye,
Pimpalner, Taq. Shirur Kasar, Dist- Beed.
Dist-Beed.

...The Appellant
(Orig. Defendant)

Versus

Ambadas Jagannath Khedkar,
Age-23 yrs, Occup- Driving
R/o Shirasgaon, Taq. Shrirampur,
Dist-Ahmednagar.

The respondent

Mr. R.B. Dhakane, Advocate for Appellant
Mr. R.P. Dhase, Advocate for Respondent

CORAM : A.M. DHAVAL, J.

RESERVED ON: 2nd NOVEMBER, 2018

PRONOUNCED ON : 21st NOVEMBER, 2018

JUDGMENT :

1. By consent, the learned Advocates are heard finally at the stage of admission.

2. This is an Appeal by a Hindu wife challenging the Judgment passed by Principal District Judge, Beed in Regular Civil Appeal No. 161/2016 on 06.01.2018, whereby, the Judgment of 2nd Joint Civil Judge, Senior Division, Beed in

HMP No.133/2016 dated 17.11.2016 of dismissal of petition for annulment of marriage was set aside and decree for annulment of marriage was granted along with maintenance of Rs.1,000/- per month to the wife. The decree was granted on the ground that the consent was obtained by fraud by concealing the mental disorder of the wife.

3. The facts relevant for determining this Appeal lie in a narrow compass. The Appeal can be determined only on the basis of the procedure adopted by both the Courts below, but brief reference to the facts is deemed necessary. The Appellant - Seema Ambadas Khedkar is original defendant and the Respondent - Ambadas is original petitioner (For the sake of convenience, hereinafter they are referred to by their first name as Ambadas and Seema). Seema and Ambadas got married on 28.01.2012 as per Hindu Religious rites at Pimpalner, Tal. Shirur (Kasar), Dist. Beed. Ambadas claimed that the maternal relatives of Seema had given him to understand that Seema was physically and mentally normal, clever and a cultured girl. After the marriage, Seema started co-habiting with Ambadas at Shirasgaon, Tal. Shrirampur. Immediately

thereafter, Ambadas noticed strange behaviour of Seema, showing signs of insanity. She was sleeping throughout the day and was not listening to anybody and was not doing any work. She was staring at fixed points, was talking to herself and used to get angry. She used to leave the night without informing anybody and the petitioner was required to bring her back. About one month after the marriage, Ambadas saw father of Seema providing him medicine. Initially, it was represented that she had headache problem and the medicines were for curing the headache. But when on 2nd March, 2012, Ambadas took Seema to Psychiatric Dr. Kailash Zalani at Ahmednagar, on enquiry by Ambadas, Dr. Zalani told him that Seema was his patient suffering from mental illness for 10 years prior to marriage and her mental condition was not curable. Ambadas learnt that he was deceived by suppression of material facts. On the next day, Seema was called by her maternal relatives on the ground that her cousin had died due to heart attack. In the meeting held between family of Ambadas and family of Seema, these facts were narrated by Ambadas to the maternal relatives of Seema, but they opposed and threatened him. On 07.03.2012, Seema was taken away by

her uncle and since then, she is residing at her maternal house. Accordingly, the petition was filed on 30.10.2012. The respondent appeared and filed say Exh. 23. She denied the allegations about the mental illness and claimed that in order to obtain divorce, the grounds are concocted. She was subjected to ill-treatment and dowry demand of Rs. 2,00,000/- for purchasing a vehicle. As her husband was not ready to maintain her, she was required to approach the Court for maintenance. Hence, the petition should be dismissed.

4. It may be stated here that in spite of serious allegations of mental disorder of the respondent, in fact, it being made a ground for claiming annulment of marriage, the learned trial Judge completely overlooked the provisions of Order 32 Rule 15 CPC relating to procedure required to be followed in case of persons suspected to be suffering from mental disorder. The petition proceeded like the normal petition. Seema has examined herself as DW3. Learned trial Judge did not accept the ground of mental disorder of Seema as a ground for declaration. Hence, she dismissed the petition.

5. The aggrieved Ambadas preferred Regular Civil Appeal No. 161/2016. The learned Principal District Judge, Beed committed the same mistake of completely overlooking the provisions of Order 32 Rule 15 and without giving any attention for appointment of Guardian-ad-litem, she proceeded to decide the Appeal. The only justification for the trial Court was that she held that Seema was not suffering from mental illness, whereas the Principal District Judge held that Seema was suffering from acute psychosis and schizophrenia, and therefore, the appeal was allowed and the marriage was declared null and void. At the same time, maintenance of Rs.1,000/- per month was awarded to the wife. Hence, this petition.

6. Heard learned Advocate Mr. R.B. Dhakane for the Appellant and Mr. R.P. Dhase, Advocate for the Respondent.

7. Following substantial question of law is framed.

Whether both the Courts below erred in not following the procedure prescribed under Order 32 Rule 15 of CPC ?
.... In the affirmative

REASONS

8. The facts referred above, disclose that there are serious allegations of mental disorder of Seema, the respondent in the HMP filed by her husband. In fact, the husband has claimed annulment of marriage on the ground of mental disorder. Even the medical evidence was laid showing that she was taking treatment for mental disorder. In such circumstances, it was bounden duty of the trial Court as well as the First Appellate Court to hold inquiry as to whether she was capable of defending herself or not.

9. In **Ramchandra Arya Vs. Mansingh - AIR 1968 SC 954**, it is held that decree against the lunatic without appointment of Guardian-at-litem is nullity and the sale held in execution of the decree is also *void-ab-initio*.

10. In **Tipanna Vs. Somnath 1990 I BCR 677**, it is held that decree against the person of unsound mind, without appointment of Guardian-ad-litem is *void ab-initio*.

11. In **Sharda Vs. Dharampal - AIR 2003 SC 3450**, it is held - the primary duty of a Court is to see that truth is arrived at. A party to civil litigation, it is axiomatic, is

not entitled to constitutional protections under Article 20 of the Constitution of India. Thus, the Civil Court, although may not have any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of section 151 of the Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit. It was further held that having regard to development in medical technology, it is possible to find out that what was presumed to be a mental disorder of a spouse is not really so. In matrimonial disputes, the Court has also a conciliatory role to play, even for the said purpose it may require expert advice. Under Section 75(e) of Code of Civil Procedure and Order 26, Rule 10A, the Civil Court has the requisite power to issue a direction to hold a scientific, technical or expert investigation.

The question as to whether a person is mentally ill or not although may be a subject of litigation, the Court having regard to the provisions contained in Order 32, Rule 15 of Code of Civil Procedure, Section 41 of the Indian Lunacy Act as also for the purpose of judging his competence to examine as a witness may issue requisite directions. It is, therefore, not correct to contend that for the aforementioned purposes the Court has no power at all. The prime concern of the Court is to find out as to whether a person who is said to be mentally ill could defend himself properly or not. Determination

of such an issue although may have some relevance with the determination of the issue in the lis, nonetheless, the Court cannot be said to be wholly powerless in this behalf. Furthermore, it is one thing to say that a person would be subjected to test which would invade his right of privacy and may in some case amount to battery; but it is another thing to say that a party may be asked to submit himself to a psychiatrist or psychoanalyst so as to enable the Court to arrive at a just conclusion.

12. Learned Advocate for the respondent relied on following Rulings :-

(i) ***Pradeep Vs. Pallavi - 2017 (4) ALL MR 247*** - In this case, it was held that suppression of illness of sickle cell anemia can be a ground for annulment.

(ii) In ***Govindan Vs. Sujatha - 2017 (5) ALL MR (Journal) 49***, it is held that for annulment of marriage, it is not necessary to prove that the mental disorder was incurable. The suppression of mental illness thereby obtaining his consent by fraud itself is a sufficient ground for annulment.

(iii) ***Preeti w/o. Kishor Rajput - 2010 (1) ALL MR 836.*** In this case, the wife was pregnant without consummation of marriage, and it was held that a decree of annulment was

rightly passed.

(iv) ***Bhagwati Vs. Anil - 2017 (5) ALL MR 457 (S.C.). -***

It was held that if the wife was minor at the time of marriage, on becoming major, she alone can file petition for annulment. However, husband can claim annulment on the ground of fraud and coercion with regard to misrepresentation of the age of the wife. Hence, the matter was remanded by the Apex Court for reconsideration.

(v) In ***Smt. Asha Srivastava Vs. R.K. Srivastava - AIR 1981 Delhi 253*** - Concealment of factum of wife suffering from incurable schizophrenia was held to be a just ground for annulment.

13. All these Rulings relate to the merits of the case and not to the procedure required to be followed when the wife is alleged to be suffering from mental disorder. Hence, unless the procedure prescribed under the law has been duly followed, the merits cannot be considered.

14. Learned Advocate for the respondent relied on the following Rulings :

(i) **Somnath Vs. Tipanna - AIR 1973 Bom. 276.** In this case, it was held that when there was statement in the plaint that plaintiff was of unsound mind, it was duty of the Court to hold enquiry. No separate application by next friend was necessary for that purpose.

(ii) **Mrs. Clara Auroro de Branganca Vs. Sylvia Angela Alvares - AIR 1985 Bom. 372.** In this case, the suit for partition was filed by mentally unsound plaintiff through a next friend. It was held that plea of omission to hold enquiry under Order 32 Rule 15 to ascertain mental state of plaintiff cannot be raised in appeal for the first time. It was further held that when the suit for cancellation of the power of attorney on the ground that the executant was a lunatic was raised and it was shown that he was an inmate of mental hospital released on parole, it must be assumed that he was of unsound mind.

(iii) In **Kasturi Bai Vs. Anguri Chaudhary 2003 (3) ALL MR 1178 (S.C.)** - A lady aged 87 years applied for appointment of a guardian for her as she was incapable of giving instructions to her lawyer or anybody else relating to pendency of suit. The Supreme Court held that High Court in

revision cannot direct the trial Court to appoint guardian without first holding enquiry as to whether the old lady was mentally infirm or not as required under Order 32 Rule 15.

(iv) In **Chetan Haridas Parekh Vs. Navnit Haridas Parekh - 2013 (2) ALL MR 296**. This Court found that the respondent was not a person of feeble mind, incapable due to any mental infirmity. Hence, the petition under Order 32 Rule 15 was dismissed.

(v) In **Balkrishnan Vs. Kalliyani - AIR 1957 Kerala 51** - The Court appointed a person as a guardian of defendant without holding any enquiry. It was held that service of summons on such guardian cannot be a due service and as the defendant was prevented by sufficient cause from appearing the order would not be binding on the defendant.

(vi) In **Nedduri Konda Reddy Vs. Maddirala Chennaiah - AIR 1981 Andhra Pradesh 313**. It was held that Rule 15 of Order 32 applies to the persons to be of unsound mind before they are sued and it also applies to a person, who was not so adjudged, but are found by the

Court on enquiry to be of unsound mind or mentally infirm. Thus, even if the Court subsequently on enquiry comes to the conclusion that the defendant is incapable by reason of his mental infirmity of protecting his interest, the Court can appoint a guardian for him.

(vii) In **re Periaswami Goundan - AIR 1954 Madras 810** - It was held that the provision of Order 32 Rule 15 can be applied and Guardian-ad-litem can be appointed even for a party which is deaf and mute after holding necessary enquiry.

(viii) Reliance was placed on **Taherakhatoon (D) by LRs. Vs. Salambin Mohammad - 1999 AIR SCW 755** - to disclose the scope of this Court in Second Appeal U/Sec. 100(C) of CPC, it reads as below :-

20. In view of the above decisions, even though we are now dealing with the appeal after grant of special leave, we are not bound to go into merits and even if we do so and declare the law or point out the error - still we may not interfere if the justice of the case on facts does not require interference or if we feel that the relief could be moulded in a different fashion.

We declare the law by holding that the High Court while dealing with a Second Appeal under Section 100, CPC erred in not framing a substantial

question of law and that it also erred in interfering with a pure question of fact relating to the genuineness of the agreement. We declare that this was not permissible in law.

15. After considering the various rulings cited before me and referred herein above, I have no doubt that both the Courts below erred in completely overlooking the provisions of Order 32 Rule 15 which are mandatory in nature. If those provisions are not followed and a decree is passed against a person having mental disorder, it would be nullity. It will not be proper not to interfere even when both Courts below have passed Judgments and orders which amount to nullity. Both the Courts below were bound to hold enquiry as contemplated under Order 32 Rule 15. When any plaint or petition is filed by a person either himself or through next friend, claiming himself to be a person suffering from mental infirmity or suit is filed by a person against a defendant or respondent, who is alleged to be suffering from mental infirmity, it is bounden duty of the Court to hold enquiry in this regard.

16. In several Judgments of the Apex Court, it has been held that the principles of natural justice is integral

part of fair procedure prescribed under Article 21. I may refer to Swadeshi Cotton Mills Vs. Union of India - AIR 1981 SC 818 wherein it is held - The principles of natural justice have taken deep judicial conscious of our people nurtured by Bina Pani AIR 1967 SC 1269, Jalka AIR 1970 SC 150, Mohindarsingh Gill AIR 1978 SC 851, Maneka Gandhi AIR 1978 SC 597, etc. They are now considered so fundamental and implicit is concept of orders liberty. Therefore, implicit in every decision making function call it judicial, quashi judicial or administrative, where authority functions under statute and the statute provides for the observance of the principles of natural justice in a particular manner. Natural justice will have to be observed in that manner and see no other.

17. Giving opportunity of hearing should be meaningful and with a purpose. If a person is too poor to appoint a lawyer, unless legal aid is given to him, he cannot defend himself. Similarly, giving opportunity of hearing to a person suffering from mental illness, is giving him no opportunity unless he is given the assistance of a Guardian-at-litem, who can take care of this defence. It may be that a

person may not appear to be mentally insane sometimes, If he is having lucid attacks at intervals. When he is not having such attacks, he may look perfectly normal, but whenever, he is having attack, he would be incapable of defending himself. Even in such cases, Order 32 Rule 15 must be strictly complied. Otherwise, a person looking normal, may contest the proceedings against him, but at any crucial moment, if he suffers from attack of mental disorder, he would not be in a position to take necessary steps to defend himself.

18. It was therefore, necessary for the trial Court to hold enquiry as contemplated under Order 32 Rule 15.

19. When a Judge comes across, a peculiar case different from the normal case, he should learn the relevant provisions like in the present case, the provisions of Order 32 Rule 15. He should find out the binding precedents on the subject both of Supreme Court as well as this Court, and thereafter, he should follow the procedure prescribed for conducting the trial. Both the Courts below did not follow this rule and conducted the matter as if the respondent was a normal party. The trial Court had at least advantage of

recording evidence of the respondent and on merits, she came to the conclusion that the respondent was not suffering from mental disorder. But this cannot be the ground for justifying her inaction to conduct enquiry as contemplated under Order 32 Rule 15. The learned Appellate Court had not even the advantage of such feeble justification. She went on to hold that the respondent is suffering from mental disorder and granted decree of annulment on such ground.

20. In the light of the rulings referred above, the Judgments and decrees of both the Courts below are *ab-initio-void*. I have therefore no alternative but to set aside both the Judgments and remand the matter with necessary directions to hold enquiry. Hence, the order :

O R D E R

- (i) The appeal is partly allowed.
- (ii) The Judgments and decrees of both the Courts below are set aside and the matter is remanded to the trial Court under Order 41 Rule 23A with a direction to the trial Court that he shall call the respondent - Seema and hold enquiry

as contemplated under Order 32 Rule 15, and if necessary shall appoint a Guardian-ad-litem for her and then only shall proceed with the trial.

(iii) Considering the urgency required to dispose of the matrimonial proceedings early and considering the valuable time consumed on account of the lapses on the part of the Courts, it is directed that the trial Court shall show utmost urgency and try to dispose of the matter as early as possible, and in any case, within a period of six months from the receipt of the record.

(iv) The parties are directed to appear before the trial court on 1st December, 2018.

(v) Registrar (Judicial) shall ensure that record reaches the trial Court within a week.

(vi) In view of the above orders, the Civil Application stands disposed of with liberty to the appellant to file a fresh application for the reliefs before the trial court as may be permitted under law.

(vii) The interim relief regarding the stay of criminal proceedings shall continue for the period of four weeks.

(viii) In view of above, the appellant shall be entitled for full Court fees refund as per Section 15 of Maharashtra Court Fees Act.

**(A.M. DHAVALÉ)
JUDGE**

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