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SUNIL

v.

SAKSHI @ SHWETA & ANR.
(Civil Appeal No. 415 of 2015)

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JANUARY 14, 2015

**[SUDHANSU JYOTI MUKHOPADHAYA AND
N.V. RAMANA, JJ.]**

Family law: Divorce petition by appellant-husband – Respondent-wife proceeded ex parte – Ex parte order set aside and case adjourned for conciliation – Next hearing, wife again remained absent – Divorce decree – Challenged by wife in High Court on the ground that the divorce decree was obtained by husband by playing fraud on court and she never appeared before the court nor she had knowledge about the case filed by husband – Family Court order sheet dated 17.9.2012 showed the presence of appellant-husband and wife – High Court framed the question as to whether the impugned judgment and decree called for interference – High Court doubted the filing of the Vakalatnama signed by the wife with her affidavit and in view of such doubt, set aside the divorce decree – Held: No question as to whether the appellant-husband played fraud on the Family Court and obtained the decree of dissolution of marriage was framed by the High Court – There was a disputed question of fact as apparent from the Family Court order dated 17.9.2012 wherein the Court recorded the presence of both the parties and after hearing their arguments, set aside the ex parte order and put forth the matter for conciliation – High Court failed to notice that it was a case in which there was a disputed question of fact which cannot be decided without framing a proper issue and in absence of evidence on record – Finding of High Court was not based on evidence but on mere presumption and conjecture – Impugned order is set aside.

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Allowing the appeal, the Court

HELD: 1. The High Court exceeded its jurisdiction and recorded its finding on presumption, surmises and conjectures. The High Court giving reference to the plaint and the written statement presumed that 1st respondent-wife never appeared before the Family Court and failed to notice order dated 17th September, 2012 which made it clear that 1st respondent-wife, who was the respondent in the said case, was present in the court and one Shri B.M. Chougale, Advocate filed Vakalatnama for her with permission. It cannot be presumed that the Family Court in its order dated 17th September, 2012 wrongly noted the presence of the appellant-husband and the 1st respondent-wife. In fact, this part of the order sheet was not referred by the High Court while coming to a conclusion that the appellant-husband has played fraud upon the Family Court as to get a decree of divorce in his favour. Merely, because of the fact that print out of the case papers of both the parties have been taken from one and the same computer software it cannot be presumed that blank Vakalatnama signed by the 1st respondent-wife was misused by the appellant-husband or he played fraud and used the same to engage some other senior counsel. Such finding of the High Court was not based on evidence but on mere presumption and conjecture. The impugned judgment is set aside. [Paras 12, 16 to 18] [706-E; 707-F-H; 708-E-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 415 of 2015.

From the Judgment and Order dated 09.07.2014 of the High Court of Karnataka Bench at Dharwad in MFA No. 22031 of 2013.

K. Raghavacharyulu, Devadatt Kamat, Rajesh Ieramdar, Gautam Talukdar for the Appellant.

A S. S. Javali, F. S. Patil, Ananta Narayan, Ankolekar
Gurudatta, Anitha Shenoy for the Respondents.

The Judgment of the Court was delivered by.

B **SUDHANSU JYOTI MUKHOPADHAYA, J.** 1. Leave
granted.

2. This appeal has been preferred by the appellant-
husband against the judgment dated 9th July, 2014 passed by
the Division Bench of the High Court of Karnataka, Dharwad
C Bench in M.F.A. No.22031/2013(FC). By the impugned
judgment the High Court while allowing the appeal preferred by
the 1st respondent-wife, set aside the decree passed by the
Family Court, Belgaum by imposing costs of Rs.25,000/-on the
D appellant-husband and directed the Family Court to lodge a
complaint through Sheristedar of the Court with the
jurisdictional Police against the appellant-husband for the
offences punishable under Sections 193, 417,419, 426,
464,465 and 468 of IPC.

E 3. The factual matrix of the case leading to the filing of the
present appeal is as follows:

The 1st respondent-wife got married to the appellant-
husband on 10th July, 2005. Out of their wedlock, the wife had
given birth to a male child. On 26th March, 2012, the appellant-
F husband filed a petition under Section 13(1)(i-a) and (i-b) of the
Hindu Marriage Act, 1955, for dissolution of marriage. On 26th
March, 2012, notice was ordered to be issued to the wife. As
per report of the process server dated 20th April, 2012, notice
sent to the wife through Court was returned unserved on the
G ground that she had gone to Bangalore. On 21st April, 2012,
notice was re-issued to the wife by RPAD. It was returned
unserved with an endorsement 'refused'. The case was listed
on 12th June, 2012. Since notice issued to 1st respondent-wife
was returned as refused, the Family Court held service of notice
H on the wife as sufficient. Counsel for the appellant-husband

prayed time for settlement. The case was adjourned to 5th July, 2012, but the appellant-husband and his counsel were absent and the case was adjourned to 30th July, 2012 for settlement; on which date the appellant-husband was present and reported no settlement. The 1st respondent-wife was placed *ex parte* and the case was adjourned to 22nd August, 2012 for appellant-husband's evidence. On 22nd August, 2012, the case was adjourned to 17th September, 2012. As per the order sheet dated 17th September, 2012, the appellant-husband and the 1st respondent-wife were present. Sri B.M. Chougale filed vakalatnama for the 1st respondent-wife and an application under Order IX Rule 7 of C.P.C. was filed praying to set aside the *ex parte* order dated 30th July, 2012. The said application was allowed, the *ex parte* order was set aside and the case was adjourned to 27th September, 2012 for conciliation. The parties were absent on 27th September, 2012 and 5th November, 2012. The case was adjourned to 27th November, 2012, on which date the appellant-husband was present. The 1st respondent-wife was absent. The Family Court adjourned the case to 3rd January, 2013 for appellant-husband's evidence observing that 1st respondent-wife did not file objections. On 7th January, 2013, the appellant-husband was present. He filed affidavit evidence. Appellant-husband got himself examined as P.W-1 and got marked Exs.P1 to P4. Cross-examination of P.W-1 was taken as nil. Evidence on the side of respondent-wife was closed and adjourned the case to 21st January, 2013 for arguments. On 28th January, 2013, after hearing arguments of the counsel for the appellant-husband, the case was posted for judgment on 6th February, 2013. Accordingly, on 6th February, 2013, the Family Court allowed the petition and dissolved the marriage of the parties.

4. The 1st respondent-wife challenged the judgment of the dissolution of marriage before the High Court on the following grounds:

- (i) *that she had no knowledge about the case filed by*

A knowledge. She took further plea that she never
appeared before the Family Court much less on
17th September, 2012 to 20th September, 2012 as
she was in Mangalore during the said period. Thus,
it was alleged that the husband obtained the decree
B of divorce by playing fraud on the Family Court.

5. The aforesaid submission was opposed by the counsel
for the appellant and record of the Matrimonial Case No.86/
2012 was called for.

C 6. The High Court by the impugned judgment framed the
following question for determination:

*“Whether the impugned judgment and decree call for our
interference?”*

D 7. After perusing the records in MC No.86/2012 referring
to certain pages of the Matrimonial Case No.86 of 2012, the
High Court found the following papers were available:

- E (a) *affidavit evidence of P.W-1;*
- (b) *application filed under Section 13 of the Family
Court Act by the husband seeking permission to
engage the Counsel;*
- F (c) *vakalath filed by Ms. Beena Gururaj Achar for the
husband;*
- (d) *vakalath filed by Sri B.M. Chougale and Sri Sunil
Kakatkar, Advocates, for the wife;*
- G (e) *process memo;*
- (f) *application dated 17.9.2012 filed under Order IX
Rule 7 of CPC by the wife;*
- (g) *affidavit of the wife annexed to the application;*

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- (h) application filed by the wife under Section 13 of the Family Court Act seeking permission to engage Counsel to defend her(wife) in the Matrimonial Case; A
- (i) list of documents filed by the Advocate for the husband (but signed by the Advocate for the wife); B
- (j) index dated 26.3.2011 filed along with the divorce petition by the Advocate for the husband.

8. Taking into consideration the memorandum of divorce petition filed by the appellant-husband and the cause title, the High Court doubted the filing of the Vakalatnama signed by the wife with her affidavit and made the following observation: C

"If these papers were to be seen in juxtaposition with page No.21 (the memorandum of divorce petition) particularly the cause title, it reveals that the space, punctuation marks (like comma and colon) and underlining used while typing the name of the Court in the cause title are identical. For the purpose of immediate reference, the same is excerpted hereunder: D

**IN THE COURT OF THE JUDGE, FAMILY COURT,
BELGAUM, AT : BELGAUM** E

There is no explanation as to how and where the papers were prepared. The above circumstances support the case of the appellant/wife. The grounds urged by the wife cannot be rejected. Hence, we hold that all the above-said case papers are the print out from one and the same computer software and the husband has made use of the blank vakalath signed by the wife for engaging senior Counsel of his Advocate and obtained a decree of dissolution of his marriage with the appellant and to deprive her rights. Thus, it indicates that the respondent/husband herein has played fraud etc., upon the Family F

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A *Court so as to get a decree of divorce in his favour and against the wife and it is a fit case to initiate criminal proceedings against the respondent/ husband."*

B 9. In view of such doubt regarding filing of Vakalatnama, the High Court set aside the judgment and decree dated 6th February, 2013 passed in MC No.86/2012 by the Family Court at Belgaum.

10. Learned counsel appearing on behalf of the appellant denied the allegation of fraud played by the appellant-husband.

C 11. Learned counsel appearing on behalf of the respondent opposed the prayer and submitted that the appellant-husband all the time tortured and harassed the wife-1st respondent for which she has also lodged a complaint before the Market Police Station Belgaum on 13th December, 2013 under Section 498(A), 494, 495 r/w 34 IPC for concealment of the first marriage and marrying during the pendency of appeal leading to bigamy.

E 12. After giving our careful consideration to the facts and the circumstances of the case and the submission made by the learned counsel for the parties, we find that the High Court exceeded its jurisdiction and recorded its finding on presumption, surmises and conjectures.

F 13. The only question framed by the High Court as apparent from paragraph 5 of the impugned judgment is "Whether the impugned judgment and decree call for our interference?" No question as to whether the appellant-husband played fraud on the Family Court and obtained the decree of dissolution of marriage or whether the appellant-husband committed any offence punishable under the provisions of Indian Penal Code was framed by the High Court.

H 14. In the present case the main allegation made by the 1st respondent-wife is that the husband played fraud on the Family Court and obtained the decree of dissolution of

marriage. In support of such submission she submitted that she had not engaged any counsel in the case and that blank Vakalatnama was taken at the time of settlement for their mutual divorce and that she never appeared before the Family Court. The High Court failed to notice that this is a case in which there is a disputed question of fact which cannot be decided without framing a proper issue and in absence of evidence on record.

15. There is a disputed question of fact as apparent from the Family Court order dated 17th September, 2012 wherein the Court recorded the presence of the appellant-husband and the 1st respondent-wife and after hearing their arguments, set aside the *ex parte* order and put forth the matter for conciliation. The relevant portion of the order dated 17th September, 2012 reads as follows:

"Ptr present

Resp present

Sri. BMC filed vakalath for resp with permission and I.A. u/O 9 R 7 CPC

Heard. IA is allowed Exparte order of resp is set aside.

For conciliation by 27-09-12."

16. The High Court giving reference to the plaint and the written statement presumed that 1st respondent-wife never appeared before the Family Court and failed to notice the aforesaid order dated 17th September, 2012 which make it clear that 1st respondent-wife, who was the respondent in the said case, was present in the court and one Shri B.M. Chougale, Advocate filed Vakalatnama for the 1st respondent-wife with permission. It is clear from the record that only after hearing both the parties the *ex parte* order against 1st respondent-wife was set aside. The matter was then sent for conciliation to 27th September, 2012. On 27th September, 2012 and 5th November, 2013, the parties were absent. The

A case was adjourned to 27th November, 2012 on which date the appellant-husband was present and the 1st respondent-wife was absent. The Family Court adjourned the case to 3rd January, 2013 for appellant-husband's evidence observing that 1st respondent-wife had not filed objections. On 7th January, 2013, the appellant-husband was present. He filed affidavit evidence, got himself examined as P.W.-1 and got marked Exs.P1 to P4. This fact was noticed by the High Court at paragraph 2 where brief facts of the case leading to the filing of the appeal was dealt with, which in fact has been reflected in our preceding paragraphs wherein factual matrix of the case has been noticed.

17. It cannot be presumed that the Family Court in its order dated 17th September, 2012 wrongly noted the presence of the appellant-husband and the 1st respondent-wife. In fact, this part of the order sheet has not been referred by the High Court while coming to a conclusion that the appellant-husband has played fraud upon the Family Court as to get a decree of divorce in his favour. Merely, because of the fact that print out of the case papers of both the parties have been taken from one and the same computer software it cannot be presumed that blank Vakalatnama signed by the 1st respondent-wife was misused by the appellant-husband or he played fraud and used the same to engage some other senior counsel. Such finding of the High Court is not based on evidence but on mere presumption and conjecture.

18. For the reason aforesaid, we have no other option but to set aside the impugned judgment dated 9th July, 2014 passed by the Division Bench of the High Court of Karnataka, Dharwad Bench in M.F.A. No.22031/2013(FC). It is accordingly set aside. The appeal is allowed. There shall be no order as to costs.