



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
FAMILY COURT APPEAL NO.18 OF 2024**

Ameya S/o. Arun Kulkarni,
Age: 27 years, Occupation: Business,
R/o. Varad, Samta Nagar, Sawedi, Ahmednagar,
Dist. Ahmednagar. ..Appellant

Versus

Isha w/o Ameya Kulkarni,
(Isha d/o Parag Mahajan)
Age: 26 years, Occupation: Household,
R/o. Plot No.75, Malhar, Sector N-1, CIDCO,
Ch. Sambhajinagar,
Dist. Ch. Sambhajinagar. ..Respondent

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Mr. Swapnil Joshi h/f M/s. J. P. Legal Associates, Advocate for the Appellant.

Mr. Sanjeev Deshpande, Senior Advocate i/by Mr. M. D. Swami, Advocate for Respondent.

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**CORAM : SMT. VIBHA KANKANWADI AND
S. G. CHAPALGAONKAR, JJ.**

JUDGMENT RESERVED ON :- 01st APRIL 2024.

JUDGMENT PRONOUNCED ON :- 15th APRIL 2024.

JUDGMENT (Per: S. G. Chapalgaonkar, J.):-

1. The appellant/orig. Respondent impugns the order dated 26.02.2024 passed by the Family Court, Ch. Sambhajinagar in Petition No. B-08 of 2023 below Exhibit-15 refusing to pass judgment on admission under Order 12 Rule 6 of the Civil Procedure Code.

2. Brief facts giving rise to the present appeal can be narrated as under:

On 13.03.2023 the marriage between the appellant and respondent has been solemnized as per Hindu rights and customs at Aurangabad. It was an arranged marriage. It is the contention

of the respondent (orig. petitioner) that unfortunately marriage brought an agony and a sense of being deceived to her as the matrimonial relationship couldn't be pulled beyond 17 days due to disinterest of the appellant (orig. respondent) in the relationship. During this period marriage could not be consummated. On 16.03.2023 the sister of the appellant decorated room with flowers and petals. However, the appellant disturbed such material and declined physical relations. On the next date i.e. on 17.03.2023, he slept alongwith his grandparents. On 23.03.2023 couple went for honeymoon to Bengaluru, but during this trip no physical relationship could be established. When the respondent complained about abnormal behavior of the appellant, he got angry and asked the respondent to leave house. Thereafter there were episodes of family meetings. However, no conciliation could be achieved. The respondent contends that the marriage could not be consummated due to some mental or physical disability of husband in the nature of 'Relative Impotency'. In this background, she approached the Family Court for annulment of marriage and decree of nullity under Section 12(1)(a) of the Hindu Marriage Act. The appellant filed his reply. He admits that the marriage could not be consummated. However, blames the respondent for the same.

3. The respondent filed an application below Exhibit-15 to pass the judgment on admission in terms of Order 12 Rule 6 of the Civil Procedure Code contending that the appellant has admitted in written statement that the marriage could not be consummated till their separation on 30.03.2023. He has also admitted that during the short stay of 15 days, the appellant and the respondent could not connect with each other mentally, emotionally or physically. The appellant filed his reply to application Exhibit-15. In paragraph nos.4 and 5 of the reply, he states thus:

“4. The Respondent states that he is perfectly normal and in the particular situation as mentioned in his Reply, he was unable to keep physical relations particularly with the Petitioner and not otherwise.

5. Unfortunately this marriage turned out to be a nightmare for the Respondent and he does not want any stigma on him, but his qua impotency (Relative impotency) towards the Petitioner was and is due to her behavior explained in Respondent's Reply.”

4. The Family Court after hearing the respective parties, rejected the application below Exhibit-15. Hence, this Appeal.

5. Mr. Joshi, learned Advocate appearing for the appellant submits that the marriage between the appellant and the respondent was nightmare. The relationship ended in just 17 days of the marriage. They separated without marriage being consummated. The appellant has admitted his behavior and relative impotency in his written statement as well as in the reply submitted to the application seeking judgment on admission. He would, therefore, urge that the prayer for grant of decree for nullity of marriage could have been passed. To buttress his submissions he relies upon the judgment of the Division Bench of Kerala High Court in case of ***Sanu Vs. Sandeep***¹ as well as judgment of this Court in case of ***Suprabha Joel Gikwad (Nee Miss Suprabha David Ghatge) Vs. Joel Soloman Gaikwad***².

6. Mr. Deshpande, learned Senior Advocate appearing for the respondent-wife submits that the Court is empowered to exercise powers under Order 12 Rule 6 of the Civil Procedure Code even in absence of admission in the written statement. He would submit that if the admission can be ascertained from any other material on record before the Court, the judgment on admission can be passed. He would further submit that the vast discretion is

¹ 2019 AIR CC 1077.

² 1997 (1) Mh.L.J. 321.

available to the Court to entertain the application under Order 12 Rule 6 of the Civil Procedure Code at any stage of proceeding, once the admission is brought on record either through pleadings or otherwise. He supports his contentions relying upon the judgment of the Supreme Court in case of *Mahendra Manilal Nanavati Vs. Sushila Mahendra Nanavati*³. He would, therefore, urge that the admission of the appellant in his written statement as well as in reply to the application Exhibit-15 conjointly could have been considered as admission of the 'Relative Impotency' and the judgment on admission could have passed. He criticized the observations of the Family Court that the parties have joined hands and raising collusive claims.

7. Before we proceed to decide main issue in the present appeal, the learned Advocate for the appellant was called upon to satisfy this Court as regards to the maintainability of the appeal against the impugned order dated 26.02.2024, since objection to that effect has been raised by Registry.

8. Mr. Joshi, learned Advocate appearing for the appellant submits that Section 19 of the Family Court Act, 1984 provides for Appeal from every judgment or order, not being an interlocutory order passed by the Family Court to the High Court. He would submit that any order passed under Order 12 Rule 6 of the Civil Procedure Code would constitute judgment having finality in the sense, that decides the controversy on that particular issue. In support of his contentions he relies upon the observations of the Supreme Court in cases of Shah *Shah Babulal Khimji Vs. Jayaben D. Kania*⁴ and *Shyam Sel and Power Limited and Another Vs. Shyam Steel Industries Limited*⁵.

³ 1965 Mh.L.J. 365.

⁴ 1981 AIR (SC) 1786.

⁵ 2023 (1) SCC 634.

9. In the present case, the order passed by the Family Court rejecting an application filed under Order 12 Rule 6 of the Civil Procedure Code is subjected to challenge. The Supreme Court in case of *Shah Babulal Khimji* (Supra) considered the issue as regards to the orders that amounts to the judgment. The illustrations of interlocutory orders, which may treated as judgment have been specified in paragraph no.120. Clause 6 of the paragraph no.120, stipulates that the order rejecting an application for a judgment on admission under Order 12 Rule 6 of the Civil Procedure Code can be treated as judgment. Similar view is reiterated by the Supreme Court in case of *Shyam Sel and Power Limited and Another* (supra). In paragraph no.114 it has been observed that in the course of trial, the Trial Judge may pass number of orders, whereby, some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or other. Such orders are purely interlocutory and parties concerned can raise grievance of such orders in appeal against final judgment passed by the Trial Judge. However, those orders would be judgments, which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned.

10. If we apply the aforesaid analogy emerging from the observation of the Supreme Court of India, it is apparent that the order refusing to pass judgment on admission under Order 12 Rule 6 of the Civil Procedure Code would amount to judgment and same can be appealed u/s Section 19 of the Family Court Act, 1984, since such order finally takes away the valuable right of the parties. Therefore, we hold that the present appeal is maintainable before this Court.

11. So far as the contentions on merits in this appeal are concerned, following points arise for our consideration:

1. Whether pleadings in the written statement of the appellant coupled with his reply to the application below Exhibit-15 can be construed as admission of “Relative Impotency” to make out case of annulment of marriage under Section 12(1)(a) of Hindu Marriage Act?
2. Whether the impugned order dated 26.02.2024 passed below Exhibit-15 by the Family Court, Aurangabad is sustainable in law?
3. Whether in the facts of the case, the case is made out to exercise discretion in terms of Order 12 Rule 6 of the Civil Procedure Code and to pass judgment on admission?

12. The respondent submitted the petition for annulment of marriage as nullity in terms of Section 12(1)(a) of the Hindu Marriage Act. The gist of her contention is that her marriage with the appellant was never consummated and brief endeavour to build up matrimonial relationship collapsed in to to. She further contends that there are no chances of consummation of marriage and from 17th day of marriage she is residing with her parents. The marriage brought an agony and a sense of being deceived to her. While narrating certain incidents, she pleads that appellant-husband threw away decoration at the first night and slept turning his back towards her. Even during the honeymoon tour no attraction and affection could be blossomed between spouses due to some disability i.e. mental or physical of the appellant-husband to have sexual relations, which may be termed as relative impotency (qua the petitioner), the marriage could not be consummated and there is no such possibility in future. In reply to the aforesaid pleadings the appellant-husband specifically admits that the marriage could not be consummated. However, attributes irresponsible behaviour towards the wife. Based on such admission, the respondent-wife filed an application Exhibit-15 for

the judgment on admission. Pertinently, the appellant-husband replied application stating that in fact spouses resided together for 13 days after marriage, but no intimacy or attraction could be developed between them. In paragraph nos.4 and 5 of the reply he specifically states that although he is perfectly normal, he was unable to keep physical relations, particularly with the respondent-wife and admits qua impotency (Relative impotency) towards the respondent-wife.

13. If the pleadings in the written statement and the reply to the application below Exhibit-15 filed by the appellant-husband is considered together, two admissions of vital importance can be gathered. Firstly, the marriage could not be consummated and secondly, appellant has relative impotency qua the respondent. The respondent seeks declaration of the nullity of marriage attributing impotency against the appellant. The expression 'Relative Impotency' is known phenomena which is different than the normal impotency in which consummation of marriage become practically impossible i.e. inability to copulate. The various causes are identified for such contentions which may be physical or mental. If the husband abstains or fails to have intercourse with his wife, the inference of the incapacity can be drawn. There are instances recognized under various judicial pronouncements where invincible and persistent repugnance in consummation of the marriage is held to be the impotency.

14. In the present case, from the pleadings in the written statement and reply to the application, it can be easily gathered that the appellant-husband has relative impotency qua the respondent-wife. The reason for non-consummation of the marriage is apparent relative impotency of the husband. The

Division Bench of Kerala High Court in case of **Sanu** (supra) observed in paragraph nos.12 to 14 as under:

“12. *In the instant case, what is admitted by the respondent is "relative impotency". What is meant by the expression "relative impotency"? Simply stated, relative impotency denotes a situation where a person is incapable of sexual intercourse with a particular person though he/she is capable of normal sexual intercourse with another person. A person may generally be capable of performing sexual act yet he may be incapable of it vis-a-vis a particular person. The incapability may be either physical or mental. It sometimes happens that a person is capable of having sexual intercourse, but incapable of performing it with the particular individual. In such a case the person must be regarded as impotent in relation to that particular individual regardless of his potency in general. It is possible that a man is impotent in respect of one woman though he can perform sexual act with other women. A man may be impotent vis-a-vis his wife, though he may not be impotent vis-a-vis to any other woman.*

13. *Relative impotency is a ground recognised by the courts to annul the marriage (See Suprabha Joel v. Joel Soloman (AIR 1997 Bom. 171), Vandana Subhash v. Subhash Benjamin (1994 (1) KLT OnLine 1108 (Bom.) = I (1995) DMC 183), Vincent Adolf v. Jume Beatrice (AIR 1985 Bom. 103), Kamla v. Jagdish Prasad (MANU/RH/0464/1985), Shantabai alias Gourabai v. Tarachand (1965 KLT OnLine 1305 (M.P.) = AIR 1966 M.P. 8), Bawi v. Nath: (AIR 1970 J.&K. 130) and Suvarna v. G.M. Achary (AIR 1979 A.P. 169).*

14. *The appellant has pleaded and proved that the parties lived together only for a period of five days after the marriage. She has also pleaded and proved that the marriage was not consummated as the respondent had no inclination towards her. Now, the respondent has admitted that he was impotent qua the appellant. In these circumstances, it appears that there is sufficient evidence to find that the marriage between the appellant and the respondent was not consummated due to the relative impotency of the respondent. Therefore, a decree for annulment of marriage can be granted in the case.”*

15. The Division Bench of this Court in case of ***Suprabha Joel Gikwad (Nee Miss Suprabha David Ghatge)*** (supra) observed in paragraph no.6 as under:

“According to our opinion, had the trial court understood the case of the appellant-wife in the background of the contents of the letter which is at Exhibit 28 read with the contents of the amendment application, the trial court would have come to a finding that though from medical point of view, the respondent-husband was not impotent, but he was impotent vis-a-vis his wife, the appellant herein. In view of the contentions of the wife that since she could not cohabit with her husband due to the relative impotency on his part, in our opinion, she is justified in claiming the relief of divorce on the ground of "relative impotency" on the part of her husband, the respondent herein”

16. Keeping in view the aforesaid observations, if the facts of the present case are considered, we find that pleadings in the written statement coupled with reply submitted by the appellant-husband to the application below Exhibit-15 is sufficient to bring home case of the respondent-wife regarding Relative Impotency of the appellant-husband.

17. Apparently, the respondent-wife had filed her application seeking judgment on admission under Order 12 Rule 6 of the Civil Procedure Code. The Family Court refused to entertain the application firstly for the reason that there is no clear admission of impotency or relative impotency qua the respondent-wife in the written statement. Secondly, after filing of the written statement and the application Exhibit-15, first time admission regarding relative impotency is employed by the appellant-husband in his reply. On the basis of such admission, the discretionary relief under Order 12 Rule 6 of the Civil Procedure Code cannot be granted. We find that such observation of the Family Court are inconsistent with the legal position as can be deduced from the catena of judgments on the subject. As observed in the earlier

paragraphs, if the admission can be ascertained from any material on record, if not from written statement before the Court, the judgment on admission can be passed. In the present case, the combine reading of the written statement and reply dated 22.11.2023 filed on behalf of the appellant-husband, admission of the relative impotency qua the respondent-wife can be gathered.

18. Although Family Court has rightly observed that the relief in terms of Order 12 Rule 6 of the Civil Procedure Code is discretionary and powers are to be exercised with care and caution, further observation of the Family Court that the parties are in collusion for claiming reliefs appears to be surmise. The Court cannot ignore that it is a matter of young couple who faced agony of frustration of the marriage. The appellant-husband admitted in his written statement that the marriage could not be consummated and attributed some fault on the part of the respondent-wife. However, in his reply to the application seeking judgment on admission, he has categorically admitted the relative impotency qua wife. In the facts and circumstances of the present case, there is possibility that the appellant-husband had hesitation to accept relative impotency at the time of filing written statement. However, subsequently, he candidly admitted the same, being satisfied of the fact that it would not put lifelong stigma on him. The relative impotency is somewhat different than the general notion of the impotency and acceptance of Relative Impotency would not brand him impotent in general parlance. In this background, it was a fit case where Court is expected to exercise its discretion and help young sufferers of marriage to find out their own ways by declaring marriage to be invalid. For the reasons as discussed above, in our opinion, case is made out to set aside the impugned order and pass decree of annulment of marriage / nullity of marriage under Section 12(1)(a) of the Hindu Marriage Act.

Resultantly, we answer points framed for consideration accordingly and proceed to pass following order:

ORDER

- a. Family Court Appeal is allowed.
- b. The impugned judgment and order dated 26.02.2024 passed by the Family Court, Aurangabad below Exhibit-15 in Petition No.B-08 of 2023 is hereby quashed and set aside.
- c. The application below Exhibit-15 filed under Order 12 Rule 6 of the Civil Procedure Code for judgment on admission is allowed.
- d. The marriage solemnized between the appellant and the respondent dated 13.03.2023 is hereby annulled and declared as void under Section 12(1)(a) of the Hindu Marriage Act.
- e. Decree of nullity be passed accordingly.
- f. The Petition No.B-08 of 2023 filed before Family Court, Aurangabad stands disposed of in aforesaid terms.

(S. G. CHAPALGAONKAR)
JUDGE

(SMT. VIBHA KANKANWADI)
JUDGE