Lakshmi Sanyal

Vs

Sachit Kumar Dhar

Civil Appeal No. 8(N) of 1971

(A. N. Grover, M. H. Beg, A. K. Kukherjea JJ)

08.09.1972

JUDGMENT

GROVER, J. -

1. This is an appeal by special leave from a judgment of the Calcutta High Court arising out of a matrimonial suit No. 17 of 1966 filed by the appellant against the respondent for a decree declaring that the marriage between the parties was null and void and asking for custody and care of children, alimony pendente lite, permanent maintenance and other reliefs.

2. The facts may first be stated. The appellant and the respondent are close relations; their mothers being real sisters. It appears that prior to January 30, 1960 they had sexual relations as a result of which the appellant became enciente (pregnant). The respondent who was originally a Hindu had got converted to Christianity and professed the Roman Catholic faith. The appellant who was also a Hindu got converted to that faith and was baptised on January 29, 1960. On January 30, 1960 one Father Antoine solemnised the marriage of the parties at the Church of St. Ignatius, Calcutta. On May 10, 1960 the first child, a daughter, was born to the appellant. She gave birth to a second child, also daughter, in October, 1961. It would appear that the appellant left the home of the respondent in the year 1965 and the action out of which the appeal has arisen was filed in July, 1966 on the original side of the High Court. It was dismissed by Mr. Justice Ghose and the appeal under the Letters Patent was also dismissed by the Division Bench.

3. In the petition a number of allegations were made relating to the conduct of the respondent. It was alleged, inter alia, that it was under duress, intimidation and undue influence that the sexual relationship started between the appellant and the respondent which ultimately resulted in the appellant conceiving a child. The conversion to Christianity as also the performance of the ceremony of marriage were all attributed to fraud, coercion and undue influence practised by the respondent. It was claimed that the appellant was a minor at the time the marriage was solemnised and the consent of her father or her guardian was not taken nor did she give her own consent freely to the marriage. Further the marriage was void because the parties were within the prohibited degree of consanguinity. All these allegations were denied by the respondent. He gave his own version as to how the intimate relationship between the parties came to be developed and how the marriage was ultimately solemnised.

4. The learned trial Judge came to the conclusion that the appellant and the respondent fell in love with each other which led to their marriage. He did not accept the case of the appellant that any fraud, coercion or undue influence had been practised or employed by the respondent or that Father Antoine had been guilty of giving fraudulent advice to the appellant. It was further held that the

marriage had been solemnised by the proper priest after a dispensation had been obtains from the authorities of the Roman Catholic Church removing the impediment of consanguinity. It does not appear from the judgment that the point relating to invalidity of the marriage on account of absence of consent of the father or the guardian of the appellant was argued or decided by the learned trial judge. The Division Bench endorsed the view of the trial Judge about the circumstances in which the marriage came to be solemnised between the parties. The question of the effect of the minority of the appellant and the lack of consent of her father or guardian was allowed to be raised and after referring to the Canon Law of the Roman Catholic Church it was held that from the standpoint of that law the objection to the validity of the marriage on the ground of lack of consent could not be sustained. The High Court expressed the view that in the present case the consent of the parents was not necessary as required under Section 19 of the Indian Christian Marriage Act, 1872, nor was there and provision in the Indian Divorce Act, 1869 which rendered a marriage null and void on the ground of minority of a party. On the question of the marriage being within the prohibited degree of consanguinity it was found that since the consanguinity between the parties was of the second degree it was certainly an impediment in the way of marriage under the Roman Catholic Law. But the impediment could be removed by dispensation which was granted by the competent authorities of the Church. For that reason the marriage could not be held to be invalid or null and void.

5. Learned counsel for the appellant has sought to raid a number of points but ultimately the only contentions which have been seriously pressed and which require decision are confined to two matters. The first is whether the marriage was invalid and void because the appellant was a minor at the time the marriage was solemnised and admittedly the consent of her father or guardian had not been taken. The second is that the parties were within the prohibited degree of consanguinity and therefore under Section 19 of the Divorce Act a decree declaring that the marriage was null and void ought to have been granted.

6. The Indian Divorce Act, 1869 was enacted to amend the law relation to divorce and matrimonial causes of persons professing the Christian relegation. Section 18 provides that any husband or wife may present a petition to the District Court or the High Court praying that his or her marriage may be declared null and void. Section 19 says that such a decree may be made on any of the four grounds. Ground No. 2 is that the parties are within the prohibited degree of consanguinity (whether natural or legal) or affinity. The other Act with which we are concerned is the Indian Christian Marriage Act, 1872 (Act 15 of 1872), which was enacted to consolidate and amend the law relating to the solemnization in India of the marriages of persons professing the Christian religion. Section 3 contains the interpretation clause. "Minor" is defined to mean a person who has not completed the age of twenty one years and who is not a widower or a widow. Provisions have been made in Parts III, V and VI in respect of those marriages where one or both of the parties happen to be minors. In Part III the marginal heading of which is "Marriages solemnized by Ministers of Religion licensed under this Act", Section 19 lays down that the father, if living, of a minor or if he be dead, his guardian and if there be no guardian then the mother of the minor may give consent to the minor's marriage. Such consent is required unless no person authorised to give the same be resident in India. It has been provided in Section 20, 21 and 22 how the person whose consent to the marriage is required under Section 19 can prohibit the issue of the certificate by any Minister and what the Minister has to do if such a notice is issued prohibiting the marriage. Part V contains provisions relating to marriages solemnized by or in the presence of Marriage Registrar. Section 44 therein applies the provisions of Section 19 to every marriage under that Part, either of the parties to which is a minor. Any person whose consent to such marriage would be required can enter a protest in the manner prescribed. When such protest has been entered no certificate shall be issued until the Marriage Registrar has examined into the matter and is satisfied that the certificate should be issued.

Part VI relates to marriage of Indian Christians which can be certified under that Part on fulfillment of the conditions given in Section 60. The first condition is that the age of the man intending to be married shall not be under 18 years and the age of the woman intending to be married shall not be under 15 years. Certain penalties are prescribed in Part VII. Under Section 68 whoever not being authorised to solemnize a marriage does so in the absence of a Marriage Registrar shall be punished with imprisonment which may extend to 10 years etc. and shall also be liable to fine. Under Section 70 any Minister of Religion solemnizing a marriage with a minor under Part III without notice or within 14 days after notice knowingly and wilfully is to be punished with imprisonment for a term which may extend to 3 years and shall also be liable to fine. Section 71 gives the punishments for a Marriage Registrar who among others commits the offence of solemnizing the marriage when one of the parties is a minor before the expiration of 14 days after the receipt of notice of such marriage or without doing the other acts mentioned in sub-section (3) of that section. Section 77 to the extent it is material may be reproduced :

> "Section 77. - Whenever any marriage has been solemnized in accordance with the provisions of Sections 4 and 5 it shall not be void merely on account of any irregularity in respect of any of the following matters, namely :
>
> (1) any statement made in regard to the dwelling of the persons married, or to the consent of any person whose consent to such marriage is required by law :
>
> (2) ...."
>
> 7. It has been necessary to set out in some detail the provisions of the Indian Christian Marriage Act because it has been strenuously argued on behalf of the appellant that since the consent of her father was not taken under Section 19 when she was admittedly a minor the marriage was null and void. It has been pointed out that even though the heading of Part III, in which Section 19 occurs confines the provisions therein to marriages solemnized by the Minister of Religion licensed under the Act, Section 19 is of general application and whenever a Christian marriage is solemnized by any priest or Minister its provisions would be applicable. Emphasis has also been laid on the fact that in Section 12, 13 and 14 the words "Minister of Religion" have been specifically used whereas they do not appear is Sections 15, 18, 19, 20, 21 and 22. Indeed in Section 20 the word used is "any Minister" and this section empowers the person whose consent to a marriage is required under Section 19 to prohibit the issue of a certificate by any Minister. Section 21 uses the words "Such Minister" which it is suggested has reference to any Minister in Section 20.

8. We may now deal with the scheme of Section 5 which read with Section 4 is the most material section and all the other provisions which have been made in the Act, particularly, in the different Parts have to be read in the light of Section 5. Section 5 gives five categories of persons by whom marriages of Christians can be solemnized in India. The first is of any person who has received episcopal ordination. The only condition laid down is that he must solemnize the marriage according to the rules, rites, ceremonies and customs of the Church of which he is the Minister. It may be mentioned that in the present case the marriage was solemnized by Father Antoine who was a Minister of Roman Catholic Church and about whom it has not been disputed that he had received episcopal ordination and was competent to solemnize the marriage under sub-section (1) of Section 5. The second category is of Clergyman of the Church of Scotland who has to solemnize the

marriage according to the rules, rites, ceremonies and customs of that Church. The next three categories, namely, 3, 4 and 5 are of those who have been licensed or appointed under the Act. In Category 3 fall Ministers of Religion licensed under the Act to solemnize the marriages. Category 4 consists of persons licensed under the Act to grant the certificate of marriage between the Indian Christians. Part III contains provisions relating to marriage solemnized by Ministers of Religion licensed under the Act, namely, Category 3. Part IV directs registration of marriages solemnized by a Minister of Religion. It points out how it is to be done by the Clergymen of England, Rome and Scotland. It also deals with the case of a marriage solemnized by a person who had received Episcopal ordination but who is a Clergyman of the Church of England, Rome or Scotland. Part V relates to marriages solemnized by or in the presence of Marriage Registrar which obviously pertains to Category 4. It is noteworthy that so far as the last three categories are concerned express and elaborate provisions have been made when a minor is to be married. In cases of marriages solemnised by persons belonging to Categories 3 and 4 the provisions are intended to ensure that the consent of the parents or the guardian should be obtained when a minor is going to get married. A minor would mean according to the definition given in Section 3, a person who has not completed the age of twenty-one years. With regard to a marriage solemnized by the person in Category 5 dealt with in Part VI it is provided by Section 61 as stated before that one of the conditions to be fulfilled is that the age of the man intending to be married shall not be under 18 years and the age of the woman intending to be married shall not be under 15 years. According to the proviso to that section no marriage can be certified under Part VI when either of the parties intending to be married has not completed his or her 18th year unless such consent as is mentioned in Section 19 has been given to the intended marriage or unless it appears that there is no person living or authorised to give such consent. It is apparent that in Section 60 the age of minority when consent of the father or the guardian is necessary is 18 years whereas in Sections 19 and 44 appearing in Parts III and V a person who has not completed the age of 21 years has been treated as a minor in whose case consent of the parents or the guardian is necessary. The making of separate provisions in Parts III, V and VI relating to marriage of minors and the requirement of consent of the parents or the guardian shows that each Part is meant to be self-contained. The categories of persons covered by those parts and the provisions appearing therein cannot be applied to marriages solemnized by persons falling in Categories I and II. Moreover in the aforesaid 2 categories (1 and 2) a person who can solemnize the marriage can do so only according to the rules, rites ceremonies and customs of the particular Church to which the Minister or the Clergyman belongs. In other words if a marriage has to be solemnized by a Minister belonging to the Roman Catholic Church which will fall within Category I he is bound to follow only the rules, rites and ceremonies and customs of the Church to which he belongs and it is not possible to apply the provisions of Part III to him. It may be mentioned that after a careful analysis of the scheme of the Indian Christian Marriage Act it was held in Rev. Father Caussavel v. Rev. Saurez (ILR 19 Mad 273.) that Part III only applies to Ministers of Religion licensed under the Act. Section 19 could not, therefore, be applicable to the marriage of the appellant and the respondent which was solemnized by a person in Category 1 of Section 5. Moreover as demonstrated by Section 60 there seems to be no uniform provision that consent must be obtained of the parents or the guardian when a person is above 18 years of age but below 21. Section 60 clearly recognises the fact that if a marriage is to be certified under Part VI the consent would be required only if either of the parties has not completed his or her 18th year. Part VII which deals with penalties shows that persons solemnizing a marriage without authority or not in accordance with what is provided are liable to severe punishment by way imprisonment as well as fine. Thus every care is taken to ensure that the solemnization of the marriage as provided by Section 5 may be done by persons who were authorised to do so and in accordance with the rules and customs of the Church to which such persons belong under Categories 1 and 2 and in

accordance with the provisions of the Act by the Minister of Religion or the Marriage Register or a person licensed under the Act falling in Categories 3, 4 and 5 as the case may be. Even with regard to solemnization of marriages to which Sections 19, 44 and 60 are applicable there is no provision that such marriages would be null and void. All that happens is that if the penal provisions are breached a person solemnizing a particular marriage will be liable to punishment. Section 77 says that whenever any marriage has been solemnized in accordance with the provisions of Sections 4 and 5 it shall not be void merely on account of the irregularity in respect of the five matters set out therein, one of which is contained in sub-section (1) and which relates to the consent of any person whose consent to such marriage is required by law. It has been argued on behalf of the appellant that Section 77 presupposes that a marriage would be void if consent to such marriage as required by law has not been obtained and it is only a mere irregularity in respect of it which will not render it void. In the view that we have expressed it is unnecessary to consider the true scope and ambit of Section 77. In our judgment the High Court was right in holding that the provisions of Section 19 of the Christian Marriage Act will not be applicable to the present case since it was solemnized by a person falling under Section 5(1) and we have to examine the Canon Law for determining the true position about the solemnization of a marriage of a person who is below 21 years of age.

9. Under Canon 88 of the Roman Catholic Church a person who has completed 21st year of age is a major; under that age, a minor. Canon 1067 lays down that a man before completing his 16th year and a girl before completing her 14th year cannot contract a valid marriage. Cannot 1934 enjoins that a pastor must seriously dissuade minor sons and daughter from contracting marriage without the knowledge or against the reasonable wishes of their parents. There is no provision in the Canon Law which contains a prohibition against the marriage of a minor in the absence of the consent of his or her parents. It appears that under Canon Law so long as a minor has reached the age of capacity to contract which, as stated before, is 16 years in case of a man and 14 years in case of a girl the marriage can be solemnized and the lack or absence of consent of the parents or guardian will not invalidate the marriage. It is wholly unnecessary to refer to the English law on the subject. There the point is governed mainly by the provisions contained in the Marriage Act, 1949 which has no applicability here. For all the reasons mentioned before we are in entire agreement with the view expressed by the High Court that the marriage of the appellant with the respondent could not be held to be null and void on the ground that since the appellant was below 21 years of age the consent of her father was not obtained.

10. The second point relates to the effect of the marriage between the parties within the prohibited degree of consanguinity. The Indian Divorce Act or the Indian Christian Marriage Act do not give any definition of what the prohibited degrees are. It has been urged on behalf of the appellant that assuming the Canon Law had to be looked at for finding the prohibited degrees it has been found that the appellant and the respondent being children of real sisters fell within those degrees. Section 19 of the Divorce Act lays down in categorical terms that a marriage may be declared null and void, inter alia, where the parties are within the prohibition degree of consanguinity. There is no exception contained in ground No. 2 in the said section. It is not open, it has been contended, to the courts to travel beyond Section 19 or the provisions of the Divorce Act to discover whether such an implement which renders the marriage nul and void ab initio can be removed by a dispensation granted by the competent authority of the Roman Catholic Church. The High Court followed the decision of a full bench of the Calcutta High Court in V. H. Lopez v. R. J. Lopez (ILR 12 Cal 706.) in which it was held that the prohibited degrees for the purpose of the marriage were those which were prohibited by a customary law of the Church to which the parties belonged. In that case also the parties were Roman Catholic and the ceremony of marriage was solemnized by the Clergyman competent to solemnize the marriage. Although no evidence of dispensation having been obtained to

remove the obstacle to the marriage on the ground of affinity which was the case there had been produced the court presumed that such a dispensation had been duly obtained from the fact that the marriage was solemnized by a Clergyman of the Roman Catholic Church who was competent to do so. According to the decision in H. A. Lucas v. Theodoras Lucas (ILR 32 Cal 187.), the courts in India will not disallow a Roman Catholic of Indian domicile who had received the necessary dispensation from marrying his deceased wife's sister who by the law of her own Church, which was Armenian in that case, may be incapable of contracting the marriage. The husband's capacity rendered the marriage valid in law. The effect of Section 88 of the Indian Christian Marriage Act was considered in Peter Philip Saldanha v. Anne Grace Saldanha (ILR 54 Bom 288.). That Section provides that nothing in the Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into. In the Bombay case the parties were Roman Catholic of Goal domicile and their marriage had been solemnized before the Registrar of Marriages in Bombay. A question arose whether such a marriage was forbidden by the personal law of the parties as being contrary to the Canons of the Church of Rome. After examining the scheme of the Indian Christian Marriage Act Blackwell, J., who delivered the judgment of the High Court said that the whole Act deals with the ceremony of marriage. The argument that Parts III, IV and V involved the exclusion of Roman Catholics from Part V of the Act was repelled on the ground that if that had been intended the Legislature would have said so. It was observed that the expression "personal law" in Section 88, refers to the capacity to contract and impediments and not the forms of solemnization. In the present case both the parties are domiciled in Indian at the time of the solemnization of their marriage they professed Roman Catholic religion. The question of capacity to marry and impediments in the way of marriage would have to be resolved by referring to their personal law. That, for the purpose of deciding the validity of the marriage, would be the law of the Roman Catholic Church namely, the Canon Law of that Church.

11. In the well known work of Bouscaren on Canon Law, Part V relates to marriage. According to Canon 1012 it is impossible for a valid contract of marriage between baptized persons to exist "without being by that very fact a sacrament". It has been described as a sacred contract. Canon 1020 provides that a pastor who has the right to assist at the marriage shall carefully investigate whether there is any obstacle to the celebration of the marriage. Among other things he must ask both the man and the woman broadly whether they are under any impediment. Canon 1035 lays down that all persons who are not prohibited by law can contract marriage. Any impediment, it is stated in this book at page 492, may be broadly defined as a circumstance which renders a marriage either illicit or invalid. This is followed by classifications of impediments. Number 7 among them is dispensable or non-dispensable, according as it can or cannot be removed by dispensation. In Canon 1040 which relates to dispensations it is stated at page 499 that a dispensation is a relaxation of law in a particular case. Canon 1076 provides that in the direct line of consanguinity, marriage is invalid between all the ancestors and descendants. In the collateral line, it is invalid up to the third degree. It is common ground that the consanguinity between the parties to the marriage in the present case is of the second degree and therefor it was an impediment in the way of the marriage under the Canon Law. It is, however, not disputed that dispensation can be granted in case of consanguinity in the second degree (vide Canon 1052) by the appropriate authorities of the Church. The only case where dispensation cannot be granted is where the impediment is of the first degree which is an absolute bar. Canons 80 and 86 deal with dispensations. The general principle underliving dispensation is "He who makes the law can dispense from the law; as can also his successor or superior and any person to whom any of these may give the faculty." In Manual of Cannon Law Fernando Della Rocca of the University of Rome, it is stated at page 61 that the obligation of observing the law cases by reason of exemption properly so called obtained by privilege or dispensation.

12. The question is whether after dispensation has been granted by the competent authority of the Roman Catholic Church the parties who are within the prohibited degrees of consanguinity can still be regarded as within those degrees. The prohibition in the matter of marriage between the parties on the ground of consanguinity is itself created by the Canon Law so far as the Roman Catholic are concerned. If the parties are related by consanguinity in the second degree that per se is an impediment to marriage but under the Canon Law itself it is dispensable and can be removed by dispensation. After dispensation it cannot be said that under the Canon Law any impediment or prohibition exists. The parties will, therefore, not be within the prohibited degree of consanguinity. Ground No. 2 in Section 19 of the Indian Divorce Act will, in these circumstances, not be applicable. The argument on behalf of the appellant that ground No. 2 in Section 19 in does not contemplate or envisage the removal of the prohibition by a particular authority doing a particular act, namely, dispensation cannot be accepted. Since the prohibited degrees are not indicated in the Indian Divorce Act and it is the Cannon Law to which one has to turn in cases where the parties are Roman Catholics, it is to the provisions of that law that resort must be had for discovering whether the parties at the time of solemnization of the marriage were within the prohibited degree of consanguinity. In our judgment once dispensation is granted by the appropriate authorities the parties cannot be regarded under the Canon Law as being within the prohibited degrees with the result that ground No. 2 in Section 19 cannot be availed of. As a matter of fact in V. H. Lopez v. E. J. Lopez (supra) it was laid down as long ago as the year 1885 A. D. that the prohibited degrees mentioned in Section 19 of the Indian Divorce Act did not necessarily mean the degrees prohibited by the Law of England. For finding out prohibited degrees it was the customary law of the class to which the parties belonged. In that case the law of the Roman Catholic was Church was applied because the parties belonged to that Church. It was further held that where a man and a woman intended to become husband and wife and a ceremony of marriage was performed between them by the Clergyman competent to perform a valid marriage the presumption in favour of everything necessary to give validity to such a marriage was one of very exceptional strength and unless rebutted by evidence strong, distinct, satisfactory and conclusive must prevail. In the subsequent decision H. A. Lucas v. Theodoras Lucas (supra) the earlier decision in Lopez v. Lopez (supra) was referred to and followed. Our attention has not been drawn by the learned counsel for the appellant to any contrary decision and we consider that the law was correctly enunciated in Lopez v. Lopez on the effect of dispensation which has held the field for all these years on the question that once dispensation has been obtained from the appropriate authorities of the Roman Catholic Church a marriage between the parties who are within the prohibited degrees of consanguinity is not null and void and no decree for nullity can be granted under Section 19 of the Indian Divorce Act in such cases.

13. For the above reasons the appeal fails and it is dismissed. The parties are left to bear their own costs in this court.

</html