

Tejinder Kaur

Vs

Gurmit Singh

Special Leave Petition (Civil) No. 13306 of 1986

(A.P. Sen, B.C. Ray JJ)

23.02.1988

ORDER

SEN. J. -

1. In this special leave petition by the wife against the decree for dissolution of marriage granted by the Additional District Judge, Patiala dated March 29, 1986 on the ground of cruelty under Section 13(i-a) of the Hindu Marriage Act, 1955, against which the petitioner-wife had preferred an appeal to the Punjab and Haryana High Court and which the High Court by its order dated July 16, 1986 dismissed in limine, a preliminary objection is raised that the petition has become infructuous inasmuch as the respondent-husband has in the meanwhile married again on August 17, 1986 i.e. just after a month of the dismissal of her appeal.

2. It is not necessary to state the facts in any detail. It is enough to say that the learned District Judge held the wife guilty of mental cruelty for having voluntarily deprived the husband of her society and cohabitation for a long period as, according to him, marriage without sex is an anathema. He further held that the wife had falsely charged the husband with adultery. It is quite evident on these facts that the marriage has irretrievably broken.

3. We heard learned counsel for the parties and the question is whether the condition prerequisite before a lawful marriage can take place after a decree for dissolution of marriage under Section 15 of the Act has been fulfilled. Prior to its amendment by the Marriage Laws (Amendment) Act, 1976 by which the proviso was deleted, Section 15 was in these terms :

15. When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again :

Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance.

4. Prior to the Amendment Act of 1976, the proviso to Section 15 laid down a period of waiting of one year between the passing of a decree for divorce by the court of first instance and the remarriage of any of the spouses. The Allahabad High Court in *Lila Gupta v. Laxminarayan* (ILR (1969) 1 All 92). and the Calcutta High Court in *Uma Charan Roy v. Kajal Roy*. (AIR 1971 Cal

307) held that such period of waiting was enjoined on the parties in the interests of public policy and morality so as to discourage divorcees from entering into fresh matrimony and to avoid confusion of parentage. It was pointed out that even in Mohammadan law a divorced wife is expected to marry any other man only after the expiry of the period of iddat to avoid a danger of confusion of paternity. It was accordingly held that the prohibition being mandatory, if any divorced party married again within a period of one year, such marriage was nullity. That view however did not find favour with this Court in *Lila Gupta v. Laxmi Narain* ((1978) 3 SCR 922 : (1978) 3 SCC 258 : AIR 1978 SC 1351) and it was held that a marriage contracted in contravention of the rule relating to one year laid down in the proviso would not be void. The court referred to the following observations of Dr. Lushington in *Catterall v. Sweetman* ((1845) 9 Jur 951, 954) : (quoted in SCC pp. 274-75, para 24)

The words in this section are negative words, and are clearly prohibitory of the marriage being bad without the prescribed requisites, but whether the marriage itself is void.... is a question of very great difficulty. It is to be recollected that there are no words in the Act rendering the marriage void, and I have sought in vain for any case in which a marriage has been declared null and void unless there were words in the statute expressly so declaring it.... From this examination of these Acts I draw two conclusions. First, that there never appears to have been a decision where words in a statute relating to marriage, though prohibitory and negative, have been held to infer a nullity, unless such nullity was declared in the Act. Secondly, that, viewing the successive marriage Acts. it appears that prohibitory words, without a declaration of nullity, were not considered by the legislature to create a nullity.

It was observed that a decree for divorce breaks the marital tie and the parties forfeit the status of husband and wife in relation to each other. But there was nothing in Section 15 of the Act to make that marriage a nullity. The reason for this was an incapacity for second marriage for a certain period does not have the effect of treating the former marriage as subsisting.

5. Under the law laid down in this enactment, monogamy is the rule and a party can only contract a valid second marriage after the first ceases to exist in the manner envisaged by Section 15. The rule laid down in this section is an integral part of the proceedings by which alone both the parties to the decree of divorce can be released from their incapacity to contract a fresh marriage. The Law Commission in its 59th Report on Hindu Marriage Act. 1955 and Special Marriage Act. 1954 however suggested the deletion of the proviso to Section 15 which laid down that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance, for the reason extracted below :

The consideration of the parties, freedom to marry and the inconvenience caused by the prohibition to remarry, outweighed the twofold purpose, i.e. avoiding confusion of parentage and checking an attempt to obtain divorce from one woman with the specific object of marrying another woman.

6. Parliament accordingly by the Marriage Laws (Amendment) Act, 1976 has done away with the period of waiting by deleting the proviso. In *Lila Gupta* case, ((1978) 3 SCR 922 : (1978) 3 SCC 258 : AIR 1978 SC 1351) this Court held that the effect of deleting the proviso is that parties whose marriage is dissolved by a decree for divorce can contract marriage soon thereafter provided, of course, the period of appeal has expired and that all pending proceedings have to be decided as if

the proviso had not been applicable. The deletion of the proviso has given rise to a question of great difficulty. The section when it speaks of a case where there is a 'right of appeal' does not in terms cover a case of an application for special leave to appeal to the Supreme Court under Article 136 of the Constitution.

7. In *Chandra Mohini Srivastava v. Avinash Prasad Srivastava*, ((1967) 1 SCR 864 : AIR 1967 SC 581), on somewhat similar facts it was held that though Section 15 in terms does not apply to a case of special leave to appeal to the Supreme Court, a spouse who has won in the High Court and got a decree of dissolution of marriage cannot by marrying immediately after the High Court's judgment take away the right of presenting an application for special leave to appeal from the other spouse. It was further held that the successful party must wait for reasonable time and make sure whether an application for special leave has been filed in this Court. Wanchoo, J. speaking for a two Judge Bench said :

It is true that Section 15 does not in terms apply to a case of an application for special leave to this Court. Even so, we are of opinion that the party who has won in the High Court and got a decree of dissolution of marriage cannot by marrying immediately after the High Court's decree take away from the losing party the chance of presenting an application for special leave. Even though Section 15 may not apply in terms and it may not have been unlawful for the first respondent to have married immediately after the High Court's decree, for no appeal as of right lies from the decree of the High Court to this Court in this matter. We still think that it was for the first respondent to make sure whether an application for special leave had been filed in this Court and he could not by marrying immediately after the High Court's decree deprive the appellant of the chance to present a special leave petition to this Court. If a person does so, he takes a risk and cannot ask this Court to revoke the special leave on this ground.

8. In the present case, the respondent in the counter-affidavit has denied any knowledge of the fact that an appeal had been preferred in the High Court or of its dismissal and therefore asserts that he was justified in contracting a second marriage on August 17, 1986 i.e. immediately after the expiry of one month from the date of the decree of dissolution of marriage passed by the learned Additional District Judge. This fact is controverted by the petitioner in her affidavit-in-reply. She has placed a copy of the registered notice dated May 31, 1986 intimating the respondent of the filing of the appeal.

9. In view of this, it was incumbent on the respondent to have enquired about the fate of the appeal. At any rate, the High Court having dismissed the appeal on July 16, 1986 the petitioner could have presented a special leave petition within ninety days therefrom under Article 133(c) of the Limitation Act, 1963 i.e. till September 14, 1986. Till that period was over, it was not lawful for either party to marry again as provided by Section 15. It was incumbent on the respondent, as observed in *Lila Gupta* case ((1978) 3 SCR 922; (1978) 3 SCC 258 : AIR 1978 SC 1351) to have apprised himself as to whether the appeal in the High Court was still pending; and if not, whether the period for filing a special leave petition to this Court had expired. We must accordingly overrule the preliminary objection following the view expressed in *Chandra Mohini* ((1967) 1 SCR 864 : AIR 1967 SC 581) and *Lila Gupta* ((1978) 3 SCR 922 : (1978) 3 SCC 258 : AIR 1978 SC 1351) cases. We wish to add that in the subsequent decision in *Lila Gupta* ((1978) 3 SCR 922 : (1978) 3 SCC 258 : AIR 1978 SC 1351) the court while dealing with the effect of deletion of the proviso observed : (SCC p. 269, para 12)

The net result is that now since the amendment parties whose marriage is dissolved by a decree of divorce can contract marriage soon thereafter provided of course the period of appeal has expired.

The court adverted to the word of caution administered by Wanchoo, J. in Chandra Mohini case ((1967) 1 SCR 864 : AIR 1967 SC 581) and reiterated : (SCC p. 269, para 12)

...even though it may not have been unlawful for the husband to have married immediately after the High Court's decree for no appeal as of right lies from the decree of the High Court to this Court, still it was for the respondent to make sure whether an application for special leave had been filed in this Court and he could not, by marrying immediately after the High Court's decree, deprive the wife of the chance of presenting a special leave petition to this Court. If a person does so, he takes a risk and could not ask the Court to revoke the special leave on that ground.

10. We must for this reason overrule the preliminary objection and direct the special leave petition to be placed for hearing. There shall be no order as to costs.

</html