

Smt. Lata Kamat

Vs

Vilas

Civil Appeal No. 708 of 1988

(G. L. Oza, S. R. Pandian JJ)

29.03.1989

JUDGMENT

OZA, J. –

1. This appeal after leave has been filed by the appellant wife arising out of a decree under Section 12(1)(d) of the Hindu Marriage Act (hereinafter referred to as the 'Act'), a decree declaring the marriage a nullity.
2. The respondent husband instituted a petition on March 7, 1984 for a declaration that the marriage of the respondent with the appellant wife was a nullity under sub-section (1) of sub-clause (d) of Section 12 of the Act on the ground that appellant, the wife at the time of marriage with the respondent was pregnant by someone other than the respondent. The appellant wife contested the allegations and ultimately the III Joint Civil Judge, Senior Division, Nagpur granted a decree in favour of the respondent by his judgment dated May 3, 1985 declaring the marriage to be a nullity.
3. The appellant wife filed a regular Civil Appeal No. 436 of 1985 on July 19, 1985 before the II Additional District Judge, Nagpur. Before this appeal could be filed, the respondent husband married one Miss Sarita daughter of Laxmanrao Modak on June 27, 1985, and in the appeal filed by the appellant, the respondent raised a preliminary objection contending that after passing go the judgment and decree dated May 3, 1985 by the trial court he has married Sarita daughter of Laxmanrao Modak on June 27, 1985. It was further alleged in the application that this marriage was solemnised on June 27, 1985 when there was no impediment against the respondent husband which could come in his way for contracting this marriage as the parties were relegated to the position as if they were not married and therefore this marriage performed on June 27, 1985 of respondent with Sarita was legal and valid and the consequence of this is that the appeal filed by the appellant was not tenable having been rendered infructuous. The II Additional District Judge, Nagpur vide his order dated August 17, 1985 allowed the objection of the respondent and dismissed the appeal as infructuous with a direction to the parties to bear their own respective costs.
4. Against this the appellant preferred a second appeal before the High Court. The High Court by its judgment dated February 20, 1987 dismissed the appeal holding that as the appeal was filed by the appellant after the remarriage of the respondent it has become infructuous. The learned Judge also dismissed the application for maintenance pendente lite and aggrieved by this judgment of the High Court after obtaining leave this appeal is filed in this Court.
5. It was contended by learned counsel for the appellant that the language of Section 15 clearly goes to show that it refers to a marriage which has been dissolved and it also talks of right of appeal

against the decree. In view of this language used in Section 15 it is not possible to distinguish between a decree of nullity under Section 11 or 12 and decree of divorce under Section 13. It was contended that the word 'divorce' has been used in this provision in a broader sense indicating that where the marriage is dissolved or the relationship is brought to an end by decree of court whether it is by declaring the marriage invalid or dissolving it by a decree but result is the same and it was contended that it is because of this that in this Act there is neither any specified definition provided for the term 'divorce' or a decree of divorce. It was also contended that when language of Section 15 refers to a right of appeal we will have to look to the provision providing for an appeal and Section 28 of the Act provides for appeals against all decrees made by the court in proceedings under this Act. It was therefore contended that the interpretation put by the lower court on the basis of judgments of some of the High Courts that Section 15 will not apply to a decree under Section 12 but would only apply when there is a decree under Section 13 does not appear to be the correct view and on this basis it was contended by learned counsel for the appellant that the courts below were wrong in coming to the conclusion that the appeal had become infructuous because the respondent has married a second time.

6. Learned counsel also referred to meaning of the word 'divorce' in Webster's Third New International Dictionary and Shorter Oxford English Dictionary. Learned counsel in support of her contentions referred to the two decisions of this Court in Chandra Mohini Srivastava v. Avinash Prasad Srivastava ((1967) 1 SCR 864 : AIR 1967 SC 581) and Tejinder Kaur v. Gurmit Singh ((1988) 2 SCC 90 : 1988 SCC (Cri) 313 : AIR 1988 SC 839). On the basis of these decisions what was contended was that the provisions of the Act have to be interpreted broadly. Learned counsel also placed reliance on the decision in Vathsala v. N. Manoharan (AIR 1969 Mad 405 : (1969) 1 MLJ 402). Learned counsel however, conceded that there are decisions in Mohanmurari v. Smt. Kusumkumari (AIR 1965 MP 194 : 1965 MPLJ 321), Jamboo Prasad Jain v. Smt. Malti Prabha (AIR 1979 All 260 : 1979 Mat LR 320) and Pramod Sharma v. Smt. Radha (AIR 1976 Punj 355 : 1977 Punj LR 447) where the question of Section 15 in relation to a decree under Section 12 has been specifically considered and decided against the appellant, but learned counsel contended that the scope and language of Section 15 coupled with the language of Section 28 has not been considered by any one of these courts. Learned counsel for the respondent on the other hand contended that the language of Section 15 refers to "marriage dissolved by decree for divorce" whereas in the present case, the marriage was not dissolved by decree of divorce. The marriage was declared as nullity under Sections 11 and 12 of the Act. Sections 11 and 12 of the Act, according to the learned counsel, talk of annulment of marriage "by decree of nullity" and it was contended that it is because of this that the various High Courts have taken a view that Section 15 will not apply to cases where a marriage is annulled by a decree of nullity in accordance with Section 11 or 12 of the Act. Learned counsel however frankly conceded that so far as Section 28 is concerned, the language is so wide that an appeal will lie even against a decree under Section 11 or 12 and if an appeal lies under Section 28 even against the order or a decree passed under Section 11 or 12, the phrase 'if there is such a right of appeal, the time for filing has expired without an appeal having been presented' are to be given its meaning it would be clear that Section 15 also will apply to decrees by which the marriage is either dissolved or annulled i.e. decrees which are passed under Section 12 or under Section 13. Learned counsel in face of this raised another contention pertaining to the application of the Limitation Act which we will examine later.

7. In order to understand the meaning of section 15 of the Act it would be better if we first notice that the words 'decree for divorce' or 'decree for nullity' has not been defined in any one of the provisions of this Act. Section 12(1) of the Act reads :

Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds namely -

Similarly Section 13(1) of the Act reads :

(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or wife, be dissolved by a decree of divorce on the ground that the other party -

It is no doubt true that these two sections have different phraseology. In Section 12 it is said that the marriage be annulled by a decree of nullity whereas in Section 13, the phraseology used is "dissolved by decree of divorce" but in substance the meaning of the two may be different under the circumstances and on the facts of each case but the legal meaning or the effect is that by intervention of the court the relationship between two spouses has been severed either in accordance with the provisions of Section 12 or in accordance with the provisions of Section 13. Probably it is because of this reason that the phrase 'decree of nullity' and 'decree of divorce' have not been defined. Section 28 of the Act reads :

28. Appeal from decrees and orders. - (1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be applicable as decrees of the court made in exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act, under Section 25 or Section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the decision of the court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order.

Under this provision all decrees made by the court in any proceeding under this Act are appealable. Apparently any proceeding under this Act will refer to a proceeding instituted under Section 13 or a proceeding instituted under Section 11 or 12 as Sections 11 and 12 talk of 'decree for nullity' and Section 13 talks of 'decree for divorce' but in order to provide an appeal against all decrees Section 28 has used a very wide terminology which include decrees under Sections 11, 12 and 13 and so far as this is concerned it could hardly be contested as the language of Section 28 itself is so clear. It is in this context that we analyse the language of Section 15. It reads :

15. Divorced persons when may marry again. - 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.

Before we examine the phraseology 'dissolved by decree of divorce' it would be worthwhile to

examine the remaining part of this provision, especially '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'. If we give narrow meaning to the term 'dissolved by decree of divorce' as contended by the learned counsel for the respondent, it will mean that if it is a decree under Section 13 then either party to the proceeding will have to wait till the period of appeal has expired or if the appeal is filed within limitation till the appeal is disposed of and before that it will not be lawful for either party to the marriage to marry again. The phrase 'either party to the marriage' if is co-related with the first part of the section, marriage which has been dissolved by decree of divorce will indicate that what was provided in this section was that when a relationship of marriage is dissolved by decree of court and either no appeal is filed or if filed, is dismissed then either party to the marriage which has been dissolved by the process of law by a decree are free to marry again. The only words on the basis of which the narrow meaning has been given to this section by some of the High Courts is on the basis of the words 'decree of divorce'. It could not be doubted that where the marriage is dissolved under Section 11, 12 or 13 by grant of a decree of nullity or divorce, the relationship is dissolved or in any way is brought to an end and it would be significant that if the language of Section 15 is interpreted in the light of Section 28 which provides for appeal and confers all right of appeal on either party to proceedings which culminate into a decree bringing an end to the relationship of marriage then we will have to infer that the legislature so far as decrees under Section 13 are concerned wanted the right of appeal to survive but in decrees under Section 11 or 12 the legislature wanted the right of appeal to be subject to the will of the other party. As it is apparent that if what is contended by the learned counsel for the respondent and held by some of the High Courts is accepted that Section 15 will not apply to cases when a decree is passed under Section 11 or 12 it will mean that as soon as a decree is passed the party aggrieved may appeal but the other party by remarriage would make the appeal infructuous and therefore the right of appeal of one of the parties to the decree under Section 28 will be subject to the act of the other party in cases where decree is passed under Section 11 or 12 but if it were so, the legislature would have provided a separate provision for appeal when there is a decree under Section 13 and a different provision for appeal when there is a decree under Section 11 or 12 as the right of appeal against a decree under Section 11 or 12 could only be a limited right subject to the desire of the other party. The legislature in its wisdom has enacted Section 28 conferring a right of appeal which is unqualified, unrestrictive and not depending on the mercy or desire of a party against all decrees in any proceeding under this Act which will include a decree under Section 11, 12 or 13 and therefore the only interpretation which could be put on the language of Section 15 should be that which will be consistent with Section 28. This phrase 'marriage has been dissolved by decree of divorce' will only mean where the relationship of marriage has been brought to an end by the process of court by a decree.

8. It is plain that the words 'divorce' or 'decree of divorced' have not been defined in this Act. The meaning of the word 'divorce' indicated in Shorter Oxford English Dictionary reads :

- Divorce - 1. Legal dissolution of marriage by a court or other competent body, or according to forms locally recognized.
2. Complete separation; disunion of things closely under ME.
3. That which cause divorce - 1607.

Similarly the meaning of the word 'divorce' as indicated in Webster's Third New International Dictionary reads :

Divorce - 1 : a legal dissolution in whole or in part of a marriage relation by a court or other body having competent authority.

In Vathsala case (AIR 1969 Mad 405 : (1969) 1 MLJ 402) the court had occasion to consider the effect of an application for setting aside an ex parte decree which was granted under Section 12 and it was contended that while the application by the husband for setting aside the ex parte decree was pending the wife contracted remarriage. Will not remarriage have the effect of making the application to set aside ex parte decree infructuous ? More or less a similar question is in the present case where it has been held that by marrying the second time the respondent made the appeal filed by the appellant infructuous, and the learned Judge placing reliance on the observations made in Chandra Mohini case ((1967) 1 SCR 864 : AIR 1967 SC 581) held :

That is the principle of Smt. Chandra Mohini v. Avinash Prasad. The principle laid down in that decision has general application. The Supreme Court pointed out that on dissolution of marriage, a spouse can lawfully marry only when there is no right of appeal against the decree dissolving the marriage or if there is a right of appeal, the time for filing of an appeal has expired or the appeal presented has been dismissed.

The question about an appeal to the Supreme Court has also been considered in a recent decision of this Court in Tejinder Kaur case ((1988) 2 SCC 90 : 1988 SCC (Cri) 313 : AIR 1988 SC 839) wherein the observations made in Chandra Mohini case ((1967) 1 SCR 864 : AIR 1967 SC 581) have been quoted and it is held that : (SCC pp. 94-95, para 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 (ILR (1969) 1 All 92) 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 views expressed in Chandra Mohini ((1967) 1 SCR 864 : AIR 1967 SC 581) and Lila Gupta (ILR (1969) 1 All 92) cases. We wish to add that in the subsequent decision in Lila Gupta (ILR (1969) 1 All 92) 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 marriage 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.

It is no doubt true that in these two decisions, this Court was considering the impact of an appeal against a decree under Section 13 itself and not a decree under Section 11 or 12 but as indicated earlier if the impact of the phraseology 'right of appeal' occurring in Section 15 is to be examined in the light of language of Section 28 as discussed earlier there will be no difference in respect of the right of appeal whether the decree is under Section 11, 12 or 13.

9. The decisions of the High Court on which reliance is placed by courts below and the learned counsel for the respondent are : (i) Mohanmurari (AIR 1965 MP 194 : 1965 MPLJ 321), (ii) Jamboo Prasad Jain (AIR 1979 All 260 : 1979 Mat LR 320) and (iii) Pramod Sharma (AIR 1976 Punj 355 : 1977 Punj LR 447). In none of these decisions the impact of the right of appeal occurring in Section 15 in view of the language of Section 28 where the right of appeal is conferred, has been considered. In our opinion, therefore the view taken by the High Court is not correct. What does Section 15 mean when it uses the phrase 'has been dissolved by decree of divorce' ? It only means where the relationship of marriage has been brought to an end by intervention of court by a decree, this decree will include a decree under Section 11, 12 or 13 and therefore the view taken by all the courts below is not sustainable. The contention of the learned counsel for the appellant has to be accepted so far as this question is concerned.

10. Learned counsel for the respondent contended that as Section 28 sub-section (4) of the Act provides for the limitation for preferring an appeal in view of Section 29 sub-section (3), provisions of Limitation Act will not apply and if they do not apply as the trial court disposed of the matter by a decree dated May 3, 1985 the period of limitation for appeal could only be up to June 3, 1985 as the period for obtaining copies as contemplated under Section 12 sub-section (2) of the Limitation Act will not be applicable and therefore even if it is held that under Section 15 the respondent had to wait till the period of limitation for appeal expires as he entered into a marriage on June 27, 1985 it was clearly after the period of limitation has expired and therefore this marriage apparently made the appeal filed by the appellant infructuous. It is not in dispute that if the period for obtaining copy of the judgment and decree is computed as contemplated in Section 12 sub-section (2) of the Limitation Act, the appeal filed by the appellant before the first appellate court was within the time and if Section 12 sub-section (2) is held applicable then this marriage which the respondent performed on June 27, 1985 could not be said to be a marriage which he was entitled to perform in view of language of Section 15 and therefore it could not be said that this marriage rendered the appeal filed by the appellant infructuous. Learned counsel for the respondent mainly placed reliance on the language of Section 29 sub-section (3) of the Limitation Act whereas learned counsel appearing for the appellant contended that Section 29 sub-section (3) talks of suit or proceedings and therefore the phrase 'proceedings' used in sub-section (3) of Section 29 could only effect to suits or other original proceedings and it will not apply to appeals as is very clear from the definition of 'suit' as defined in Section 2(1) of the Limitation Act. It was therefore contended that the provisions of the Limitation Act will be applicable to appeals under Section 28 of the Act. Learned counsel for the appellant placed reliance on the decisions in Chander Dev Chand v. Smt. Rani Bala (AIR 1979 Del 22 : 81 Punj LR (D) 43), Smt. Sipra Dey v. Ajit Kumar Dey (AIR 1988 Cal 28 : (1988) 1 HLR 735 : 1988 Mat LR 88) and Kantibai v. Kamal Singh Thakur (AIR 1978 MP 245 : 1978 Jab LJ 535).

11. Section 2(1) of the Limitation Act defines the 'suit'. It reads : "suit" does not include an appeal or an application.

It clearly enacts that suit does not include an appeal or an application. Section 29 of the Limitation Act reads :

29. Savings. - (1) Nothing in this Act shall affect Section 25 of the Indian Contract Act, 1872.

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only insofar as and to the extent to which, they are not expressly excluded by such special or local law.

(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.

(4) Section 25 and 26 and the definition of 'easement' in Section 2 shall not apply to cases arising in the territories to which the Indian Easement Act, 1882, may for the time being extend.

Sub-section (2) of this section provides that where the limitation provided by the special or local law is different from the period prescribed by the Schedule, the provisions of Section 3 will apply. In the Hindu Marriage Act, the period of appeal is prescribed. In the schedule under the Limitation Act, there is no provision providing for an appeal under the Hindu Marriage Act. Thus the limitation prescribed under the Hindu Marriage Act is different and is not prescribed in the Schedule. Thus the provisions of Section 3 shall apply and therefore it is clear that to an appeal or application the provisions contained in Sections 4 to 24 shall apply, so far and to the extent to which they are not expressly excluded by the special or local law and sub-section (3) of this section provides that the provisions of this Act shall not apply to any suit or other proceedings under any marriage law. It is therefore clear that so far as sub-section (3) is concerned, the impact of it will be that the provisions of the Limitation Act will not apply so far as a suit or an original proceeding under the Act is concerned but sub-section (3) will not govern an appeal.

12. The Schedule in the Limitation Act does not provide for an appeal, under the Hindu Marriage Act but it is only provided in sub-section (4) of Section 28 of the Hindu Marriage Act. Thus the limitation provided in sub-section (4) of Section 28 is different from the Schedule of the Limitation Act. According to sub-section (2) of Section 29, provisions contained in Sections 4 to 24 will be applicable unless they are not excluded. It is clear that the provisions of the Act do not exclude operation of provisions of Sections 4 to 24 of the Limitation Act and therefore it could not be said that these provisions will not be applicable. It is therefore clear that to an appeal under Section 28 of the Hindu Marriage Act, provisions contained in Section 12 sub-section (2) will be applicable, therefore the time required for obtaining copies of the judgment will have to be excluded for computing the period of limitation for appeal. A Division Bench of Delhi High Court in Chandra Dev Chandha case (AIR 1979 Del 22 : 81 Punj LR (D) 43) held as under : (AIR pp. 24-25)

The Hindu Marriage Act is a special law. That this "special law" prescribes "for an appeal a period of limitation" is also evident. The period of limitation is 30 days. It is a period different from that prescribed in the First Schedule to the Limitation Act, 1963. But when we turn to the First Schedule we find there is no provision in the First Schedule for an appeal against the decree or order passed under the Hindu Marriage Act. Now it has been held that the test of a "prescription of a

period of limitation different from the period prescribed by the First Schedule" as laid down in Section 29(2), Limitation Act, 1963 is satisfied even in a case where a difference between the special law and Limitation Act arose by omissions to provide for a limitation to a particular proceeding under the Limitation Act, see, *Canara Bank, Bombay v. Warden Insurance Co. Ltd., Bombay* (AIR 1953 Bom 35 : 55 Bom LR 614 : (1954) 24 Com Cas 87) approved by the Supreme Court in *Vidyachran Shukla v. Khubchand Baghel* (AIR 1964 SC 1099, 1102 : (1964) 6 SCR 129 : 25 ELR 354).

Once the test is satisfied the provisions of Section 3, 4 to 24, Limitation Act, 1963 would at once apply to the special law. The result is that the court hearing the appeal from the decree or order passed under the Hindu Marriage Act would under Section 3 of the Limitation Act have power to dismiss the appeal if made after the period of limitation of 30 days prescribed therefor by the special law. Similarly under Section 5 for sufficient cause it will have the power to condone delay. Likewise under Section 12(2) the time spent in obtaining a certified copy of the decree or order appealed from will be excluded. If it is so, Section 12(2) of the Limitation Act is attracted, and the appellants in all the three appeals will be entitled to exclude the time taken by them for obtaining certified copy of the decree and order. The appeals are, within time.

Similar is the view taken by the Calcutta High Court in *Smt. Sipra Dey* case (AIR 1988 Cal 28 : (1988) 1 HLR 735 : 1988 Mat LR 88) and also the M.P. High Court in *Kantibai* case (AIR 1978 MP 245 : 1978 Jab LJ 535). It is therefore clear that the contention advanced by the learned counsel for the respondent on the basis of the Limitation Act also is of no substance.

13. Consequently the appeal is allowed. The judgment passed by the High Court as well as by the first appellate court is set aside. We remand the matter back to the first appellate court as that court had disposed of the appeal treating it to have been rendered infructuous. We therefore direct that the learned II Additional District Judge, Nagpur before whom the appeal was filed, will hear the appeal on merits and dispose it of an accordance with law.

14. A suggestion was made by the counsel for the appellant about some tests and willingness of the appellant for getting those tests performed which could be used as additional evidence in respect of the paternity of the child born to the appellant which has been made a ground for declaration of marriage as nullity. Without expressing any opinion, it would be appropriate for the lower appellate court to consider the matter if parties approach about additional evidence. The appellant shall be entitled to costs of this appeal. Cost quantified at Rs. 2500.

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