CALCUTTA HIGH COURT

Uma Charan Roy

Vs.

Sm. Kajal Roy

A.F.O. D. No. 221 of 1966

(S.K. Chakravarti and S.K. Datta, JJ.)

01.09.1970

JUDGMENT

S.K. CHAKRAVARTI, J.

1. This is an appeal at the instance of a husband against whom a decree of nullity of his marriage with the respondent has been passed by a learned Additional District Judge at Alipore. The appellant seems to be rather unfortunate in his matrimonial ventures. He was first married with one Durga Bala Roy in or about 1947 and on the 2nd of October, 1958, Durga Bala died leaving five issues. In less than three and half months from the date of the death of Durga Bala the appellant married again one Susama, to be precise, on the 15th of January, 1959. On the 11th of September, 1963, he filed a suit for dissolution of his marriage with Susama on the ground that she had been suffering from venereal disease in a communicable form for a period of not less than three years immediately preceding the presentation of the petition. It would further appear that before this suit was filed he and the present respondent Kajal fell in love with each other. The suit for dissolution of the marriage was decreed on the 23rd of March, 1964, under Section 13(1)(v) of the Hindu Marriage Act (Ext B). Admittedly the appellant Susama as also Kajal are all Hindus. On the 18th of March, 1964, that is to say five days before the appellant got his decree of divorce of the marriage with Susama he filed a notice of marriage with Kajal before the Marriage Officer for Calcutta and 24 Parganas District (Ext. 2). On the 21st of April, 1964, the appellant and Kajal were married under the Special Marriage Act and exhibit 3 is the certificate of marriage. On the 17th of June, 1964. Kajal filed the instant suit mainly on the allegation that her marriage with the appellant was void as the appellant's marriage with Susama was continuing upto the date of the marriage or, in other words, as her marriage with the appellant contravened the provision of clause (a) of Section 4 of the Special Marriage Act. She had also made allegations in her petition that by fraud and misrepresentation she was induced to enter into this form of marriage and she was actually not aware of the fact that the appellant had a wife living on that date. But the appellant contested that suit and denied these charges of fraud and misrepresentation and further alleged that Kajal was aware of everything and that as a matter of fact it was she who induced him to enter into this marriage. He further contended that in no view of the law could Susama be considered as his spouse on the date of his marriage with Kajal and as such the marriage was not a nullity. The learned Additional District Judge was of the opinion

that in view of clause (4) of Section 29 of the Hindu Marriage Act, Section 15 of the Hindu Marriage Act did not apply to the instant impugned marriage but he held that the marriage is bad in view of Section 30 of the Special Marriage Act and granted a decree of nullity. Hence this appeal by the husband.

2. The first point that is pressed by Mr. Himangshu Kumar Bose, the learned Advocate for the appellant, is to the effect that the learned Judge erred in applying Section 30 of the Special Marriage Act to this impugned marriage. In our view, he is quite justified in this criticism of the learned Judge's judgment. Section 30 of the Special Marriage Act, as it stands would apply to the dissolution of a marriage under the Special Marriage Act. Here the marriage with Susama was dissolved, not under the Special Marriage Act, but under Section 13(1) (v) of the Hindu Marriage Act.

3. Mr. Amarendra Mohan Mitra, learned Advocate appearing on behalf of the respondent, however submits that Section 15 of the Hindu Marriage Act would also apply and that accordingly the marriage between the appellant and Susama must be deemed to be subsisting on the 21st of April, 1964, when the appellant and Kajal entered into a marriage under the provisions of the Special Marriage Act. Section 15 of the Hindu Marriage Act stands as follows : -

> "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."

Mr. Mitra submits that the marriage between the appellant and Kajal was held before one year had elapsed from the date of the decree of dissolution of the marriage, namely, between the appellant and Susama and as such it must be held that the appellant had a spouse living on the 21st of April, 1964 and his marriage with Kajal would be hit under Section 4(a) read with Section 24(1)(i) of the Special Marriage Act.

4. Section 4 of the Special Marriage Act runs as follows : -

> "Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely :-
> (a) neither party has a spouse living;
> (b) neither party is an idiot or a lunatic;
> (c) the male has completed the age of twenty-one years and the female the age of eighteen years;
> (d) the parties are not within the degrees of prohibited relationship; and

(e) where the marriage is solemnized outside the territories to which this Act extends, both parties are citizens of India domiciled in the said territories."

Section 24(1) of the Special Marriage Act runs as follows : -

"Any marriage solemnized under this Act shall be null and void and may be so declared by a decree of nullity if -
(i) any of the conditions specified in clauses (a), (b), (c) and (d) of Section 4 has not been fulfilled; or
(ii) the respondent was impotent at the time of the marriage and at the time of the institution of the suit."

5. Prima facie the contention urged by Mr. Mitra is of substance. The term 'spouse' has not been defined either in the Hindu Marriage Act or in the Special Marriage Act and therefore has to be given its ordinary grammatical meaning. It means a wife or a husband. Therefore, if in law, the marriage between the appellant and Susama is held to be continuing up to 21st of April, 1964, the marriage between the appellant and Kajal would be null and void under the provisions of the Special Marriage Act referred to above.

6. Mr. Bose has very strenuously contended that in view of Section 29(4) of the Hindu Marriage Act, Section 15 of that Act has no application to the impugned marriage. Sub-section (4) of Section 29 runs as follows :

"Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954 (43 of 1954) with respect to marriages between Hindus solemnized under that Act, whether before or after the commencement of this Act."

7. We are not in a position to accept this contention of Mr. Bose. Sub-section (4) of Section 29 can only mean that if there is any inconsistency between the provisions of Hindu Marriage Act and Special Marriage Act then the provisions of Hindu Marriage Act would not apply to a marriage held under the Special Marriage Act. It does not mean that the effect of the provisions of the Hindu Marriage Act would not apply in case one party to a marriage under the Hindu Marriage Act enters into a marriage with another person under the Special Marriage Act.

8. Mr. Bose has further contended that the term 'spouse' as used in clause (a) of Section 4 would apply only to a spouse married under the Special Marriage Act. Or, in other words, his contention is to the effect that if a person has been married under the Special Marriage Act and then re-married under the Special Marriage Act, clause (a) would apply, but not if the parties were married under the Hindu Marriage Act originally and later on one party to the marriage contracts the marriage under the Special Marriage Act. We see no reasons to limit the use of the term 'spouse' in clause (a) of Section 4 to be a spouse married under the Special Marriage Act. We cannot read into this section something which is not there. Moreover, if we accept this interpretation of Mr. Bose it would lead to disastrous results. A person who is a Christian and has been married according to Christian rites, may, without dissolving his first marriage, get re-married with some other person under the Special Marriage Act, and, accordingly, if we accept Mr. Bose's interpretation that marriage would be valid. There are provisions similar to clause (a)

of Section 4 of the Special Marriage Act in the Hindu Marriage Act as also in other Acts. Conversely also a party to a marriage under the Special Marriage Act may choose to marry a Hindu under the Hindu rites and if we follow Mr. Bose's interpretation, this second marriage cannot be questioned. Accordingly we do not accept this contention raised by Mr. Bose.

9. The next point that is urged by Mr. Bose is to the effect that even if Section 15 of the Hindu Marriage Act would apply, still the effect of dissolution of the marriage between Hindus under Section 13 would take effect instantaneously and accordingly Susama could not be considered to be a spouse of the appellant at the time of his marriage with Kajal. Mr. Bose is overlooking Section 15, altogether in our view. It is clear from this section that at least for a year since the date of the decree of dissolution of marriage, a party to the marriage cannot re-marry and if he or she remarries such a marriage shall be illegal. Mr. Bose has referred to the decision in *Mohanmurari v. Smt. Kusumkumari reported in*[1] That was a case where there was a decree of annulment of marriage and Section 15 had no application and therefore that decision is of no help to Mr. Bose,

10. On the other hand Mr. Mitra has referred to a number of decisions mostly under the Indian Divorce Act to show that similar provisions under the Indian Divorce Act were interpreted to show that the marriage continued till the expiry of the period of six months. The earliest case is *Warter v. Warter*[2], It deals with Section 57 of the Indian Divorce Act which runs as follows :

> "When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired, or when six months after the date of any decree of a High Court dissolving a marriage have expired and no appeal has been presented against such decree to the High Court in its appellate jurisdiction,

or when any such appeal has been dismissed, or when in the result of any such appeal any marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death :

> Provided that no appeal to Supreme Court has been presented against any such order or decree.

When such appeal has been dismissed, or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death." The provision is almost similar to that in the Hindu Marriage Act or the Special Marriage Act. In this case it was held that the first marriage, having been celebrated within six months from the date of the final decree of divorce, was invalid. In *Esther Marie Jackson v. Frederick Ormond Layland Jackson*[3], it has also been held that where the successful petitioner in a suit for dissolution of marriage entered into a second marriage within six months of the decree for dissolution of marriage becoming absolute, the second marriage was void. In *Battie v. Brown*[4], *(2))* it was held that Section 57 of the Indian Divorce Act does not completely dissolve the tie of marriage until the lapse of a specified time after the decree for dissolution of marriage and the marriage continues to be in force within the

[1] AIR 1965 Mad Pra 194
[2](1890) 15 PD 152
[3](1912) ILR 34 All 203
[4] ILR 38 Mad 452 : AIR 1916 Mad 847

meaning of Section 19(4). In *J.J. Turner v. Mrs. A.E. Turner*[5], this Court also held that by reason of the provisions of Section 57 of the Divorce Act and of the fact that the time specified by Section 57 had not elapsed from the date of the order of the High Court confirming the decree nisi the marriage with Turner's former wife was in force on the date of the second marriage and consequently the second marriage was null and void.

11. Mr. Bose tries to distinguish these decisions on the ground that there both the first and the second marriages were held under Christian rites, whereas in the instant suit the first marriage was held under Hindu Marriage Act and the second marriage was held under the Special Marriage Act. This is a distinction without a difference. The point which arose for determination in the decisions referred to above was what was the effect of the six months' period after the decree had become final and it is on an interpretation of that proviso, that the courts held that the first marriage continued till the six months' period had expired. In our view, therefore the principles enunciated in the aforesaid decisions would apply with equal force in the instant case. What is more in *Smt. Chandra Mohini Srivastava v. Sri Avinash Prasad Srivastava*[6], the Supreme Court while construing Section 15 also came to the same conclusion. So we must hold that the effect of Section 15 of the Hindu Marriage Act in this case was that the marriage between the appellant and Susama continued for a period of one year from the 23rd of March 1964 and therefore, on the 21st of April, 1964, Susama was a spouse of the appellant and as such the marriage between Kajal and the appellant is null and void under Section 4 read with Section 24 of the Special Marriage Act.

12. Mr. Bose has lastly contended that Kajal was a consenting party to this marriage and had entered into this marriage with full knowledge that Susama was alive, and, as such, she cannot question this marriage. As we have already pointed out, the marriage is null and void and even if Kajal had acquiesced in it, that does not prevent her from questioning it at a later stage.

13. The result therefore is that we confirm the judgment and decree passed by the Additional District Judge, though on a different ground and the appeal fails and must be dismissed.

14. There will be no order as to costs.

Salil Kumar Datta, J.

15. I agree with my Lord that the appeal should be dismissed. I would, however, like to say my views on the questions involved in the appeal.

16. This appeal, by the husband against the decree of nullity of marriage on the wife's petition under Section 24 of the Special Marriage Act, 1954 (Act XLIII of 19541 raises some interesting points of law. The husband had five children by his first wife Durga who died on October 2, 1958. Thereafter on January 15, 1959, he married his second wife Susama according to Hindu rites. Shortly after the second marriage, the husband became

[5]25 Cal WN 710 : (AIR 1921 Cal 51)

[6] AIR 1967 SC 581

acquainted with one Kajal, the petitioner in this proceeding and their acquaintance ripened to highest intimacy, borne out by wife's letter - exhibits A series. In 1963, the husband brought a

suit for a decree of dissolution of his marriage with Susama under Section 13(1)(v) of the Hindu Marriage Act, 1955, (Act XXV of 1955) on the ground of her venereal disease in a communicable form. While the proceedings were pending, the parties before us gave notice to the Marriage Officer on March 18, 1964, of their intended marriage under Section 5 of the Special Marriage Act. The husband's marriage with the second wife Susama was dissolved by a decree of divorce on March 23, 1964. The appellant husband and Kajal were married under the Special Marriage Act on April 21, 1964.

17. On June 17, 1964, Kajal filed an application under Section 24 of the Special Marriage Act, for a declaration of nullity of her said marriage solemnized on April 21, 1964. The grounds inter alia were that the marriage was in violation of the provisions of the Hindu Marriage Act and at the time of the impugned marriage, Susama the second wife of the husband was alive and accordingly the condition specified in clause (a) of Section 4 was not fulfilled. As a result the marriage was null and void and should be so declared by the Court. There were allegations of fraud and suppression by the husband of the facts of his previous marriages as also of its spouse Susama who was admittedly living then and even thereafter. The suit was contested by the husband who denied the allegations of fraud or suppression of facts relating to his previous marriages and facts connected therewith. On the point of law, it was. submitted that provisions of the Hindu Marriage Act had no application to the impugned marriage which was under the Special Marriage Act.

18. The learned Judge disbelieved the case of the petitioner about fraud and suppression of facts by the husband and rightly so in our opinion, as the exhibits A series clearly indicated that the petitioner was fully aware of the previous marital life of the husband. In fact, in my opinion, she was, to a large extent, responsible for this marriage. The learned Judge however held, on an interpretation of Section 30 of the Special Marriage Act that the impugned marriage within one month of the decree of divorce against Susama was null and void and decreed accordingly. The present appeal is against the said decree.

19. Mr. Himangshu Kumar Basu, the learned counsel appearing for the husband appellant, has contended that the learned Judge's interpretation of Section 30 was wholly wrong, as it has no application to the facts of the case. It seems also obvious that Section 30 applies where the earlier marriage was under the Special Marriage Act which is not the case before us. In fact, this position has not been contested before us by Mr. Amarendra Mohan Mitra, the learned counsel for the wife respondent.

20. Mr. Basu's more formidable contention is that Section 15 of the Hindu Marriage Act, in view of its Section 29(4), has no application to a marriage under the Special Marriage Act. Elaborating his arguments, Mr. Basu contended that the Hindu Marriage Act and the Special Marriage Act are complete codes in themselves, containing elaborate provisions regarding conditions of marriage, respective rights of parties as also judicial processes in connection therewith. It would not be permissible to import provisions of one statute to the other and in fact by Section 29(4) of the Hindu Marriage Act it is provided that nothing in the said Act shall affect the provisions in the Special Marriage Act with respect to marriages between Hindus solemnised under that Act. If Section 15 of Hindu Marriage Act had thus no application, the marriage could not be impugned in law. Mr. Mitra has disputed the above contentions as, according to him, the provisions of the Hindu Marriage Act shall, under its Section 29(4), affect only the provisions of marriage under

the Special Marriage Act and nothing beyond.

21. It appears to me that the contentions of Mr. Basu are without substance. As it is well known, a Hindu couple at its option may solemnise their marriage either under the Hindu Marriage Act or the Special Marriage Act and any marriage of the Hindus registered under either of the Acts shall be valid in law. It will be noticed that the conditons of a marriage under the Hindu Marriage Act in its Section 5 thereof are little more elaborate than those of a marriage under the Special Marriage Act as provided in its Section 4. Section 29(4) of the Hindu Marriage Act only makes this provision that the conditions of marriage under this Act shall not be imported or treated as conditions of a marriage under the Special Marriage Act. It has no further restrictive power and certainly cannot be extended to exclude application of Section 15 which does not by itself relate to the provisions with respect to marriage between Hindus under the Special Marriage Act.

22. Section 15 of the Hindu Marriage Act imposes conditions in respect of re-marriage of parties under decree of divorce and we are concerned here with the proviso which makes it unlawful for any party to marry again unless at the date of such marriage one year has elapsed from the date of the decree of the court of first instance. This is a personal obligation on either of the spouses which must be deemed to be incorporated in the decree of divorce itself and is its integral part and must be complied with before the intending party is free from the fetters of his or her earlier marriage for a re-marriage under whatever statute he or she may elect as the section makes no exception. The rigorousness of the provisions of Section 15 was considered by the Supreme Court in AIR 1967 Supreme Court 581 which extended its principles to applications for special leave for appeal before the court, though no appeal as of right lies from the decree of the High Court. It cannot therefore be said that with the passing of a decree for divorce everything between husband and wife comes to an end; on the contrary, for re-marriage after the decree for divorce under the Hindu Marriage Act, the concerned party has strictly to comply with its provisions and infraction thereof would only lead to penal consequences.

23. Mr. Basu has contended with great emphasis that a decree takes effect on the day it is passed and if so. the parties cease to have any relationship on that date and no longer are spouses of an erstwhile marriage dissolved by a decree of divorce. Accordingly Section 4 (a) of the Special Marriage Act could not be resorted to in making the impugned decree invalid in the said circumstances as it had no application.

24. Mr. Basu in this connection also referred to the decision in AIR 1965 Madhya Pradesh 194 where it was held that when the decree is passed under the Hindu Marriage Act, declaring a marriage void, the marriage is void ab initio, as if no marriage in law has taken place. This decision has no bearing here, as Section 15 imposes the prohibition in regard to decrees of divorce and in case of decrees of nullity of marriage the section has no application. On behalf of the respondent, we were referred to a number of decisions which lay down the principle that during the time within which remarriage is prohibited, as in Section 57 of the Indian Divorce Act (Act IV of 1869), marriage between the spouses is deemed to subsist. In (1890) 15 PD 152, it was laid down that there was a prohibition contained in Section 57 of the Indian Divorce Act against remarriage of either party within six months of the date of the final decree,

> "as the Indian Law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time under the decree. This is an integral part of the proceedings

by which alone both parties can be released from their incapacity to contract'a fresh marriage".

(1912) ILR 34 All 203 was a case where the husband on the decree for dissolution of marriage becoming absolute, remarried within six months. On the petition of the wife of this marriage, it was held following *(1890) 15 PD 152, Warter v. Warter* (supra) that the husband's marriage with his former wife who was alive was still in force when he went through the form of a marriage with the petitioner wife who was thus entitled to the declaration that her marriage with the husband was null and void. In ILR 38 Mad 452 : AIR 1916 Madras 847 (2)) in similar circumstances it was held that the former marriage is to be considered still in force at any rate to the extent of preventing a subsequent marriage during the lifetime of the other party to such marriage until the prohibition resulting from the survival of such other party is removed by virtue of the section. The subsequent marriage was held as void while the previous marriage was held still "in force" within meaning of Section 19(4) for affording the jurisdiction to court to declare the second marriage a nullity. In 25 Cal WN 710 : (AIR 1921 Calcutta 517, following the above case *Warter v. Warter* (supra) it was held that the subsequent marriage, held within six months from the date confirming a decree nisi was null and void, even though the parties to the subsequent marriage lived as husband and wife for eighteen years.

25. It must be mentioned that the cases cited above were governed by the Indian Divorce Act and the Courts proceeded on the basis that as the former wife was alive at the time of subsequent marriage and the former marriage was then in force, it violated provisions of Section 19(4) of the said Act which prohibited a marriage of a person with a spouse living. That was the ground of distinction, according to Mr. Basu, which made the decisions inapplicable to the facts of this case where the parties were Hindus and two statutes were involved in regard to the two marriages. Further according to Mr. Basu, the language in clause (a) of Section 4 of the Special Marriage Act is merely "a spouse" without any qualification which would have been qualified if it is intended to include spouses of an earlier marriage under the Hindu Marriage Act.

26. On a consideration of the cases cited above, I am of the opinion that the principles enunciated therein should also be made applicable to the marriages under the Hindu Marriage Act with which we are concerned here. For the purpose of only preventing a spouse from marrying again within the limit of time prescribed in the proviso to Section 15 of the Hindu Marriage Act, the former marriage dissolved by a decree of divorce under its provisions must be deemed to subsist for a period of at least one year from the date of such decree in the Court of the first instance. The prohibition being attached to the persons involved, any infraction of the rule leading to a second marriage would obviously violate the provisions of clause (a) of Section 4 of the Special Marriage Act and make such subsequent marriage null and void.

27. Such interpretation is in harmony with the other provisions of the connected statutes and is consistent with the objects for which they have been brought to the statute book. As otherwise, even a Hindu spouse haying a marriage solemnised under the Hindu Marriage Act, as here, could validly enter into a marriage under the Special Marriage Act with impunity. The consequences thus would be disastrous for the society also and would lead to acute problems while the marriage acts seek to prevent their coming in existence. It may also be noted that the words "spouses" in the said sections has been used without any qualification, meaning that the spouse

contemplated in the said provision would include a spouse of any valid marriage.

28. Provisions similar to those contained in Section 15 of the Hindu Marriage Act, have been made in Section 57 of the Indian Divorce Act and Section 30 of the Special Marriage Act. This was necessary also for the additional reason that provisions of the Special Marriage Act are available to any person residing in India (excepting the State of Jammu and Kashmir) and have also extra territorial operation.

29. It is not necessary to deal further with the contention of Mr. Basu that the wife is not competent to the reliefs prayed for in the circumstances or with the contention of Mr. Mitra that the notice of marriage contained the false declaration of the husband being unmarried in place of divorce or the notice being given at a time when the earlier decree was yet to be passed. The impugned marriage, as we have seen, is null and void for non-fulfillment of the provisions of clause (a) of Section 4 of the Special Marriage Act and the respondent wife was entitled to such declaration as rightly held by the trial Court.

30. The appeal accordingly fails and is dismissed, without any order as to costs, as proposed.
Appeal dismissed.