

DELHI HIGH COURT

Chander Dev

Vs.

Rani Bala, (Delhi)

C. M. No. 184 of 1978. In F.A.O. No. 13 of 1978

(V. D. Misra and A. B. Rohatgi, JJ.)

25.4.1978

JUDGEMENT

V. D. Misra and A. B. Rohatgi, JJ.

1. These are three appeals under the Hindu Marriage Act, F.A. O.20 of 1978 is wife's appeal against the decree of divorce passed in favor of the husband. F.A.O. 18 of 1978 is the husband's appeal against the decree refusing him restitution of conjugal rights. F.A.O. 14 of 1978 is again a husband's appeal against an order denying him custody of children.

2. The question before us is these appeals are barred by time. The registry has raised an objection that out of time.

3. In all the three cases the appellants applied for certified copy of the judgment, decree or order passed by the trial court as was the case. After they had obtained these they filed appeals. If the time requisite for obtaining a copy of the decree or order is excluded, the appeals were filed within 30 days and are well within time; but if in law it could not be excluded, the appeals would certainly be out of time. The respondents contend before us that the appellants are not entitled in law to exclude the time so taken by them in obtaining a copy of the decree or order of the trial court. The only question, therefore, is whether for the purpose of computing the period of 30 days prescribed under Section 28(4) of the Hindu Marriage Act the provisions of Section 12 of the Limitation Act can be invoked.

4. The respondents' chief objection *in limine* is that under Section 28(4) of the Hindu Marriage Act an appeal has to be preferred within 30 days from the date of the decree or order and the Limitation Act 1963 does not apply to marriage

and divorce laws, therefore, the appellants are not entitled to exclude the period spent in obtaining copies. Unhindered by authority we were minded to rebuff this objection by a simple answer. We would say that if Limitation Act 1963 did not apply to the Hindu Marriage Act, Section 3 of the Limitation Act also would not apply. By what authority would a court then dismiss an appeal preferred after the prescribed period of 30 days ? Now the result would be that although an appeal may be barred by limitation it would not be liable to be dismissed under Section 3 Limitation Act. We thought such was the incontestable logic of the argument. (See *Canara Bank, Bombay v. Warden Insurance Co. Ltd.*,).

5. But counsel for the respondents invited our attention to a decision of a learned single Judge of this Court in *Smt. Tara Seth v. Dharamvir Seth*,² There it was held that Limitation Act, 1963 did not apply to the Hindu Marriage Act by reason of the provision contained in Sub-Section (3) of Section 29 of the Limitation Act and therefore the appeal had to be filed within 30 days. The wife was held not entitled to invoke the provisions of Section 12(2) and Section 5 of Limitation Act. Her appeal, which was otherwise within time if days spent in obtaining copies had been excluded, was dismissed as time-barred. It is correctness of this view that is challenged before us by the appellants.

6. The two material provisions we may notice at once. One is Section 28(4) of the Hindu Marriage Act which says :

Every appeal under this Section shall be preferred within a period of thirty days from the date of decree or order."

The other is Section 29(2) and (3) of the Limitation Act 1963 which reads:

"29. (1).....

(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 in so far 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)....."

7. Under the Indian Divorce Act, 1869, the remedy to obtain relief in matrimonial causes is by way of suit Under the Hindu Marriage Act, 1955 the remedy is by a petition. Under both Acts the court is empowered to pass decrees. In matters regarding maintenance, alimony, or custody of children etc. the court is empowered to pass orders.

8. Now Sub-section (3) of Section 29 of the Limitation Act says that nothing in the Act shall apply to any suit or other proceeding under any law for the time being in force with respect to marriage and divorce. What does it mean? It means that to original proceedings under Indian Divorce Act, the Hindu Marriage Act, and other Acts like the Parsi Marriage and Divorce Act and the Special Marriage Act the Limitation Act does not apply. For example there is no limitation for bringing a suit for divorce under the Indian Divorce Act or for a proceeding under the Hindu Marriage Act.

9. Under the Limitation Acts IX of 1871 and XIV of 1871 where there was no such provision and under the Limitation Act of 1908 where an analogous provision existed but confined only to suits under the Indian Divorce Act, it was held that the limitation law did not apply to suits under the Indian Divorce Act. (See *A. v. B* ³ The reason is obvious. These are continuing wrongs (See Section 23 Limitation Act 1908). Refusal of a wife to return to her husband was held to constitute a continuing wrong. *Hem Chand v. Shiv*, ⁴ (*Fakirgauda v. Gangi*, ⁵ Similarly, a suit between Muhammadans, Hindus or Parsi for restitution of conjugal rights was saved from the bar of limitation by Section 23 of the Act of 1908 and such suits could never practically be barred : (See *Binda v. Kaunsilia*, ⁶ *Basawaneva v. Balappa*, ⁷ Thus suits brought under the Indian Divorce Act (i.e. as between Christians) were and are expressly excluded from the operation of the limitation laws; See Section 29(3) of the Limitation Act (Act IX of 1908) and Section 29(3) of the Act XXXVI of 1968).

10. Under the Limitation Acts of 1859 and 1871 it was held that though the Act was inapplicable, delay in presenting or prosecuting a petition for dissolution of marriage under the Divorce Act was a ground for disallowing the petition. There is a similar provision in the Hindu Marriage Act where delay is made a

ground for refusal of relief (see Section 23(d)). But the objection on the ground of delay would not hold good in cases where the marriage was an initio void (see *Mills v. Mills* ⁸ civ in the Probate and Divorce Court).

11. Section 29, Clause (3) of the Limitation Act 1908, provided that "nothing in the Limitation Act shall apply to suits under the Indian Divorce Act, 1869". Suit does not include an appeal (see Section 2(10) of the Limitation Act 1908 and 2(1) of Limitation Act 1963). The courts held under the Act of 1908 that this prohibition was restricted only to suits and did not extend to appeals (see *A. v. B.* ⁸

12. In the Limitation Act, 1963, the provisions of the Act of 1908 have been broadened so as to include other laws. There are a number of such Acts like the Parsi Marriage and Divorce Act, the Special Marriage Act, the Hindu Marriage Act and the Dissolution of Muslim Marriages Act dealing with marriage and divorce. On the recommendation of the Law Commission the present Sub-Section (3) has amplified Section 29(3) of the Act of 1908 so as to exclude the application of the Limitation law to suits or proceedings under any law dealing with marriage and divorce. The term "suit" or "proceeding" means suits under the Divorce Act and petitions for dissolution of marriage or for judicial separation or for declaration of nullity of marriage, restitution of conjugal rights or for any other relief under the Hindu Marriage Act.

13. The Limitation Act, 1963, is inapplicable to original proceedings. But appeals from decrees in suits under the Indian Divorce Act and appeals from decrees and orders under the Hindu Marriage Act are not excluded from the operation of the Indian Limitation Act. Section 55 of the Divorce Act 1869 places appeals from such decrees under the laws in force for every original side decree, Such appeals are, therefore, governed now by Article 117 of the Limitation Act, 1963. In the case of Hindu Marriage Act appeals are provided by the Special law itself, that is, Section 28(4). And by reason of Section 29(2) of the Limitation Act 1963 Sections 3 and 4 to 24 thereof shall apply. The law may therefore be stated thus. The prohibition contained Section 29(3), Limitation Act, 1963 is restricted only to suits and proceedings and hence does not extend to appeals.

14. But the question we posed at the beginning remains unanswered. Will the period spent in obtaining copies be excluded under Section 12(2), Limitation

Act, 1963 ? The answer is 'yes'. The answer is given in Section 29(2) of the Limitation Act, 1963, which we have set out above.

15. 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 (supra)* approved by the Supreme Court in *Vidyacharan Shukla v. Khubchand*,⁹

Once the test is satisfied the provisions of Sections 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 therefore 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, therefore, within time.

16. The Supreme Court in *Vidya Charan Shukla v. Khub Chand*, (supra) held that Section 12 of the Limitation Act 1908 applied to the special law contained in the Representation of the People Act, 1951. The Limitation Act applied to the appeal by reason of Section 29(2) and the appellant in the High Court was held entitled to exclude time spent in obtaining copy under Section 12(2) of the Limitation Act.

17. In principle there is no distinction between the Representation of the People Act, 1951 and the Hindu Marriage Act so far as limitation for appeals is

concerned. Both the Ads are special laws. Both prescribed the period of limitation of 30 days. We do not see why the appellant should not be entitled to exclude the days requisite for obtaining copy of decree and order against which he intends to appeal. As the Supreme Court has said :

"A party can reasonably desire to obtain a copy of the judgment for deciding, after studying it, whether it is worthwhile appealing against it, and if so, on what grounds".

(Vidya Charan Shukla (supra) at p. 1114 per Raghubar Dayal J.). Any other view would lead to anomalous result as the case of Smt. Tara Seth (F.A.O. No. 100 of 1977, decided on 3-1-1978 (Delhi)) (supra) illustrates where for no fault of her and for something beyond her control the wife's appeal was dismissed.

18. Counsel for the respondents recommend for our acceptance the view of the learned single Judge in Smt. Tara Seth's case, (supra). We regret our inability to do so. If we accept that view we will be making law a plaything of chance. It will then depend on accident whether an aggrieved party gets a copy of the decree or order before the expiry of 30 days and is able to prefer an appeal before the time is up. People will lose and win cases on mere caprice or chance. There will be no certainty in the course which one may take. The party will not be the master of his fate. His fate will be in the hands of the copying department. Such a construction of Section 29(3) of the Limitation Act would lead to absurd results.

19. Counsel for the respondents heavily relied on Sub-Section (4) of Section 23 of the Hindu Marriage Act which says :

"In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of cost in each of the parties".

20. Counsel contended that as the Court has to give a copy of the decree to each of the parties free of cost there is no difficulty for the wife or the husband in preferring an appeal from the decree within 30 days of the passing thereof in terms of Section 28(4) of the Act. The fallacy in this reasoning is that Section 23(4) of the Hindu Marriage Act provides for giving a copy of the decree of divorce only and of no other decree passed under the Hindu Marriage Act, such as a decree of restitution of conjugal rights or decree of nullity or decree of judicial separation. Nor is the Court obliged to give to the parties copy of orders

such as for maintenance and alimony, custody of children disposal of property etc.

21. We were referred in this connection to Rule 6-A of Order 20 of the Civil Procedure Code. Rule 6-A was introduced by the Amendment Act, 1976. It says that the decree shall be drawn up as expeditiously as possible and in any case within 15 days from the date on which the judgment is pronounced; but where the decree is not drawn up within the time aforesaid, the court shall, if requested to do so by a party desirous of filing an appeal against the decree, certify that the decree has not been drawn up and indicate in the certificate the reasons for the delay; and there upon an appeal may be preferred against the decree without filing a copy of the decree and in such cases the last paragraph of the judgment shall, for the purpose of Rule of Order 41, be treated as the decree.

22. On the basis of this recent amendment in the Civil Procedure Code respondents' counsel contended that a party desirous of appealing against the decree may obtain only a copy of the judgment and may prefer an appeal there from for "the last paragraph of the judgment shall for the purpose of Rule 1 of Order 41 be treated as the decree", if no decree is drawn up. We cannot accept this argument.

23. Section 28(1) of the Hindu Marriage Act says that all decrees made by the Court in any proceedings under this Act shall, subject to the provisions of Sub-Section (3), be appealable as decree of the court made in the 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 exercise of its original civil jurisdiction. This means that the procedure prescribed by the Civil Procedure Code shall apply to an appeal preferred under Section 28(4) of the Hindu Marriage Act. The emphasis is more on the procedure applicable to appeal than on the right of appeal conferred under the Act. The procedure in appeal shall be governed by the Civil Procedure Code. The right of appeal is governed by Section 28(3) and (4) of the Hindu Marriage Act.

24. Section 28(1) of the Hindu Marriage Act means that Order 41 of the Civil Procedure Code along with other relevant provisions of the said Code shall apply to an appeal filed under Section 28(4) of the Act. The result is that under Section 28(1) of the Hindu Marriage Act the appeal is equated with an appeal

filed under the Civil Procedure Code in the matter of not only the exercise of powers, jurisdiction and authority but also in the matter of procedure to be followed from the date of receipt of the appeal to its final disposal. This is clear from Section 21 of the Hindu Marriage Act which says that the proceedings under the Act shall be regulated, as far as may be, by the Civil Procedure Code.

25. Now the party appealing will, therefore, have to file a certified copy of the decree or order from which he wishes to appeal. For that he must apply to the copying department. Even if no decree is drawn up and the judge has certified so under Rule 6-A of Order 20 CPC, the party will have to obtain a copy of the judgment at least in order to study the reasons given by the judge and to enable the appellate court, at the time of admission of the appeal, to examine those reasons on which the decree is founded. The judges' decisions are not oracles of Delphi. They have to give reasons for their opinion.

26. Under Order 41, Rule 1 Civil Procedure Code the Court has no power to dispense with the copy of the decree. Decree must, therefore, be filed. But if the decree has not been drawn up and the court certifies the fact that the decree has not been drawn up the appellant shall be entitled to prefer an appeal against the decree without filing a copy of the decree because "the last paragraph of the judgment shall, for the purpose of Rule 1 of Order 41, be treated as a decree". This means a copy of the judgment in every case a party shall have to obtain and file. The judge is not required to give a copy of his judgment to the parties at the time of the pronouncement. Even under Section 23(4) of the Hindu Marriage Act only a copy of the decree of divorce has to be given.

27. This clearly shows that a party desirous of appearing against the decree under the Hindu Marriage Act will have to apply to the copying agency for a certified copy of the judgment and decree, if the decree has been drawn up. If he intends to appeal from an order he has to obtain a certified copy of the order. He cannot avoid doing so, for otherwise he will not know the reasons which weighed with the judge in deciding the case against him. Under Section 12(2) of the Limitation Act he will be entitled to exclude the period spent by him in obtaining the copy of the decree or order.

28. Our conclusion therefore, is that Section 12(2) of the Limitation Act, 1963 applies to appeals under Hindu Marriage Act and, therefore, the time requisite for obtaining a copy of the decree or order appealed from shall be excluded in

computing the period of limitation. The decision in Smt. Tara Seth (FAO No. 100 of 1977, decided on 3-1-1978 (Delhi) (supra) must be held to be incorrect and must be overruled.

29. We would therefore reject the preliminary objection and hold that the appeals are within time. Consequently CM 184 of 1978 under Section 5 of the Limitation Act is dismissed as in fructuous.

Order accordingly.

Cases Referred.

1. AIR 1953 Bombay 85
2. FAD No. 100 of 1977 decided on 3-1-1978.
3. (1898) ILR 22 Born 612, (616, 617).
- 4.1892) ILR 16 Born 715;
5. (1899) ILR 2.3 Born 807.
6. (1891) ILR 13 Allahabad 126;
7. 38 Bom LR 502 .
8. (1901) 5 Cal WN
9. AIR 1964 Supreme Court 1099 (1102).