**MADHYA PRADESH HIGH COURT**

Mohanmnrari

Vs.

Smt. Kusmnkumari

First Appeal No. 65 of 1963, Decided on 22-12-1964, from decree of Dist. J., Gwalior, 29.6.1963
(T.P. Naik and Shiv Dayal, JJ.)

22.12.1964

**JUDGMENT**

**Naik J.**

1. The judgment in this appeal shall also dispose of first appeal No. 66 of 1963.

2. Facts relevant for our purpose are as follows. Mohanmurari and Smt. Kusumkumari were married at Gwalior on 20th June 1957. Their gauna was performed on or about 19th November 1957. The wife Smt. Kusum Kumari came to her parents house some time in January 1958 and has not gone to her husband's house, since. In November 1962, the husband Mohanmurari filed a suit against the wife Suit. Kusumkumari for restitution of conjugal rights, on the allegation that she had been staying at her father's place without any reasonable cruise. The wife Smt. Kusumkumari denied the claim of her husband but claimed an annulment of her marriage with Mohanmurari on the allegation that he was impotent at the time of her marriage with him and had continued to be so till the institution of the suffer.

3. The trial Court dismissed the husband's suit for restitution of conjugal rights but decreed the suit of the wife annulling the marriage between Mohanmurari and Smt. Kusumkumari on the ground of the former's impotency.

4. Against the aforesaid judgments and decrees the husband Mohanmurari filed first Appeals Nos. 65 mid 66 of 1963 on 5-10-1963, During the pendency of these appeals, the respondent wife Smt. Kusumkumari, on 20-1-1964, married one Banarasidas Saxena of Morena, and then on 2-7-1994 applied for dismissal of the appeals as in

fructuous.

5. The question is whether the re-marriage of the respondent wife with Banarasidas during the pendency of these appeals rendered the appeals infrutuous.

6. The appellant husband Mohanmurari by these appeals seeks to challenge the order of the trial Court annulling his marriage with the respondent Smt. Kusumkumari, as also the order refusing his prayer for restitution of conjugal rights. Consequentially, if, for some reason, these prayers cannot be granted, by reason of the respondent's remarriage with Banarsidas, the appeals shall have to be dismissed as infrutuous.

7. The Hindu Marriage Act, 1955 classifies marriages as void, voidable, and valid. Under section 11 of the Act, "Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any of the conditions specified in clauses (i), (iv) and (v) of Section 5'; while under section 12 of the Act, '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 my of the grounds mentioned in the section, where the law, on grounds of public policy, has prohibited certain marriages, the marriages are declared to be void. These marriages are simply empty ceremonies, mere form without any substance and do not confer on the marrying spouses the status of a husband or wife. These are, therefore, said to be void ab initio, as if no marriage in law had taken place. On the other hand, voidable marriages are valid until avoided. The Legislature has sought to separate the religious character of the sacrament, which a Hindu marriage essentially is, from its so-called secular character because, in the orthodox concept, even its secular character bad a religious aspect. In its secular aspect, the essential object of a marriage is a free physical union of two persons us husband and wife for the purpose of procreation. Consequently, where impediment existed at the time of the marriage which may hamper this object, the law permits its avoidance by the parties to it if they or any of them so choose. Thus, impotency from the date of marriage till the date of the petition and idiocy or lunacy at the time of marriage permit its avoidance. So also, the case of marriage where consent was obtained by force of fraud or where the woman was pregnant at the time of her marriage. But, such marriages can be avoided only subject to certain limitations prescribed in the Act, When so avoided, they are annulled by a decree of nullity, i.e. as if they went void ab initio. However, when once a valid marriage has been

performed, the law does not permit its avoidance. No decree of nullity can ever be passed in respect of it. It can, however, be dissolved by a decree of divorce subject to the provisions of Section 14 of the Act on any of the grounds enumerated in Section 13.

8. Unlike English Law, where, under the Matrimonial Causes Act, 1950, Section 12, every decree for a divorce or for nullity of marriage shall, in the first instance, be a decree nisi not to be made absolute until after the expiration of six months from the pronouncing thereof, unless the court by general or special order from time to time fixed a shorter time, the Hindu Marriage Act does not provide For a decree nisi in the first instance. On the other hand, under Section 21 of the Act, the procedure is left to be governed by the Code of Civil Procedure, subject to the provisions of the Act and to such rules as this High Court may make in this behalf. In the absence of any such provisions or rules in this in half, the decree in a suit for dissolution or nullity is at once final, though, before granting such a decree, the law enjoins on the. Court the duty to be satisfied on certain points enumerated in Section 23, such as the petitioner has not been accessory to or connived at or condoned the act or acts complained of, or that the petition is not collusive, or that it is not unnecessarily or improperly delayed, and that there has been made even Endeavour to bring about it reconciliation. Under Section 18 of the Act, such decrees have been made appealable, and it has also been provided by Section 15 that 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. This Section 15 has limited its operation to a marriage dissolved by a decree of divorce and has no application to a marriage annulled by a decree of nullity. Consequently, the limitations to re-marriage provided by Section 15 have no application to a decree of nullity.

9. In this state of the law, there was no legal incompetency in the respondent wife for contracting a re-marriage once her marriage with the appellant had been annulled lay a decree of nullity. The marriage between the appellant and the respondent having been annulled, their status as husband and wife of each other had ceased to exist. If the

appellant wanted the status quo to be preserved till the final decision of the appeals, he should have applied for a prohibitory order restraining the respondent from marrying again till the appeals filed by him had been decided. But, in the absence of any such order, the respondent was no more the wife of the appellant and there was no provision in law which created any impediment to her re-marriage. No provision of section 5 of the Act which laid down the conditions of a valid Hindu marriage was violated. The re-marriage was thus a valid marriage. It was neither void nor voidable, it could not be annulled or dissolved for the reason that it was contracted during the pendeney of the appeals, nor could if be affected by the ultimate decision of the appeals, even if it went in favor of the appellant. Unfortunately, for the appellant, the law has made no provision for such a contingency, just as it has made in Section 15 in the case of a decree of divorce.

10. There thus appears to be a lacuna in the law which will have to be rectified before any relief can be given to the appellant. It appears that we have borrowed the provisions of section 13 of the Matrimonial Causes Act, 1950 in drafting section 15 of the Hindu Marriage Act, 1955, but lost sight of the other provisions of the English law which have a bearing on this question. In the first place, in the English law, the right to re-marriage after a decree absolute of nullity depends not on any statute but upon the terms of the decree itself and on the Ecclesiastical law. Secondly, by Section 12(1) of the Matrimonial Causes Act, 1950, every decree for nullity of marriage, in the first instance, must be a decree nisi which cannot be made absolute until after the expiration of six months from the pronouncement thereof, unless the Court by general or special order from time to time fixes a shorter time, which by virtue of the Matrimonial Causes (Decree Absolute) General Order 1946 read with Section 34(2)(b) of the Matrimonial Causes Act, 1950, has been reduced to six weeks. Then, under section 31(1)(i) of the Judicature (Consolidated) Act, 1925, an appeal lies from the granting or refusal of a decree nisi of nullity of marriage to the Court of Appeal as of right within six weeks of the granting of refusal thereof; and under section 31(1)(e), no appeal lies from a decree absolute of nullify in favour of any party who, having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree. So that, a situation such as we have here is to a large extent saved and safeguarded because the marriage tie is not completely dissolved till the decree nisi is made absolute; and as an appeal against a decree nisi has to be filed, if at all, before that date, the situation such as we have here cannot and does not ordinarily arise. It may also be mentioned that section 13 of the Matrimonial

Causes Act, 1950 deals with a situation arising after a decree absolute of divorce. It says :

> "Where a decree of divorce has been made absolute and either there is no right of appeal against the decree absolute or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented on an appeal has been presented but has been dismissed, either party to the marriage may many again.

It is true that no provision similar to the above has been made even in England in cases of decree absolute of nullity; but in so far as no appeal lies against a decree absolute of nullity, the difficult posed before us in this case cannot arise. What other difficulties may arise is not germane to the present discussion and, therefore, we leave it at that.

11. The respondent cannot now revert to her status as the wife of the appellant even if his appeals succeed, because her re-marriage, under the law, is neither void nor voidable, but valid and irrevocable. Once this is realized, there is no difficulty in holding that the appeals have become in fructuous and have to be dismissed as such.

12. The appeals are accordingly dismissed. There shall be no order as to costs.

Appeals dismissed.