

BOMBAY HIGH COURT

Suhas Manohar Pande

Vs.

Manohar Shamrao Pande

A.F.O.D. No. 124 of 1961.Special Civil Suit No.2 of 1960

(Padhye and Chandurkar, JJ.)

27.07.1970

JUDGMENT

Padhye, J.

1. This appeal arises out of a suit for maintenance filed by the appellant Suhas alias Ambadas against the respondent Manohar on the allegation that he is the son of the respondent Manohar and is entitled to be maintained by him. According to the plaintiff-appellant he was born on 30th October 1955. The suit has been filed on the 6th of January 1959. In this suit the plaintiff claimed a declaration that he is entitled to maintenance and claimed a decree for maintenance at Rs. 250/- per month or such other amount as the Court may fix from the date of suit and claimed a declaration of charge on the property described in Schedule A of the plaint or a sufficient part thereof for payment of such maintenance. The plaintiff alleged that his mother Taramati who is now dead was married to the defendant on 30th January 1955 and during the lawful wedlock he was born to them on 30th October 1955. According to the plaintiff, the defendant who is his father is in law under personal obligation to maintain the plaintiff who is his minor son. In order to claim this relief the plaintiff stated some additional facts which arose out of a prior proceeding between the defendant-respondent and the plaintiff-appellant's mother Taramati. The plaintiff's mother Taramati had earlier filed Civil Suit No.32-A of 1957 in the Court of the Third Additional District Judge, Akola, for restitution of conjugal rights. It was her contention in that suit that she was married to the respondent Manohar on the 30th of January 1955 and during the lawful wedlock she had given birth to a son from the defendant on the 30th of October 1955. Thereafter the defendant without any reasonable cause withdrew from her society and she, therefore, claimed restitution of conjugal rights against the respondent Manohar. This suit was decided on the 1st of October 1957 by the Third Additional District Judge, Akola in favor of the plaintiff's mother Taramati and her claim for restitution of conjugal rights was decreed. Against this judgment and decree, the present respondent had filed an appeal being First Appeal No.6 of 1958, in this Court. However, during the pendency of this appeal, the plaintiff's mother Taramati died on 2nd of

August 1958. The present respondent then stated in the first appeal that by reason of the death of Taramati. the appeal had abated and he got the appeal pending in the High Court dismissed on 6th October 1958 The plaintiff contends that the decision in Civil Suit No.32 A 1957 has become final on the question of validity of the marriage between Taramati and the respondent and the respondent could not escape the liability of maintaining the plaintiff who was and is a minor.

2. The defendant-respondent while resisting the suit of the present plaintiff denied the fact of marriage between the plaintiff's mother Taramati and himself either on 30th of January 1955 as alleged or at any time. He also denied that the plaintiff was born during the alleged lawful wed lock on the 30th of October 1955 The fact, however, of the suit having been filed by Taramati against him under Section 9 of the Hindu Marriage Act being Civil Suit No. 32-A of 1957 and a decree having been passed in that proceeding has been admitted by the defendant He also admitted that he had filed First Appeal No.6 of 1958 in this High Court, but since Taramati had died pending the appeal and no cause of action survived, the appeal was dismissed on the statement of his counsel The defendant further contended that on account of the death of Taramati that decree as to restitution of conjugal right was rendered ineffective as it was purely a decree for personal rights According to the defendant, the decision of the trial Court in Civil Suit No.32 A of 1957 was not a final decision and on account of the death of Taramati, the said decree was rendered unexecutable and infructuous

3. The learned trial Judge framed issues in the case and tried issues Nos. 1 (a),3(a) and (b) as preliminary issues. The three issues which were tried as preliminary issues were these :

1 (a) : Whether the decision in Tr. Civil Suit No.32 A of 1957 on the file of the Third Additional District Judge. Akola, is final and operates as *res judicata* between the parties in the present suit?

3 (a) : Whether the plaintiff's failure to continue the proceedings under Section 26 of the Hindu Marriage Act amounts to waiver of his right to obtain maintenance?

(b) Whether the dismissal of the proceedings under Section 26 of the Hindu Marriage Act in Tr. Civil Suit No.32-A of 1957 on the file of the Second Additional District Judge. Akola, operates as *res judicata* in this case?

4. The learned trial Judge answered all the three issues in the negative and ordered that the trial of the suit will proceed on rest of the issues. These findings having been given on the preliminary issues, the trial further proceeded for determining the question whether the plaintiff's mother Taramati was married to the defendant or not and whether the plaintiff was born to the deceased Taramati and the defendant during a lawful wed-lock These issues are 1(b) and 1(c). Several" witnesses were examined on behalf of the plaintiff as well as on behalf of the defendant and on the appreciation of that evidence the learned Judge came to the conclusion that the plaintiff's mother Taramati was not married to the defendant on 30th January 1955 and as such, the question about the plaintiff being born during the lawful wed lock of Taramati and the defendant

did not arise On these findings, the learned Judge further held that the question as to the liability of the defendant to maintain the plaintiff and the quantum of maintenance did not survive The learned Judge. therefore, dismissed the suit of the plaintiff. The Plaintiff has challenged the judgment and decree by this appeal.

5. Mr Palshikar, the learned counsel for the appellant, urged before us that the findings given by the lower Court on the preliminary issues were illegal and should have been decided in favor of the plaintiff If so decided, the plaintiff was entitled to a decree for main tenancy against the defendant and it was not necessary in this suit to go over again Into the question whether Taramati was the legally married wife of the defendant as the decision in the former suit, namely. Civil Suit No.32-A of 1957 was final and binding and that could not be challenged by the present respondent We have. therefore, heard Mr. Palshikar only on this aspect of this case without going into the evidence on the merits of the question regarding the factum of marriage between the deceased Taramati and the defendant raised again in this suit. On hearing Mr. Palsikar, we find that the matter can be decided on the basis of the preliminary issues except of course, regarding the quantum of the maintenance to be allowed in which question the lower Court did not enter and it is not necessary to go into the voluminous evidence adduced in this case regarding the factum of marriage between the deceased Taramati and the defendant Manohar.

6. It has been now an admitted position that there were proceedings between the deceased Taramati and the respondent Manohar under Section 9(1) of the Hindu Marriage Act in which Taramati claimed against Manohar restitution of conjugal rights on the allegation that she was married wife of the respondent Manohar and the respondent had withdrawn from her society without any reasonable excuse and as such she was entitled to a decree for restitution of conjugal against the respondent Manohar In this suit the present respondent denied that he had any connections whatsoever with Taramati. He denied to have married on 30th January 1955. In fact he denied any marriage at all with Taramati He also denied that the present appellant was a child begotten of his union with deceased Taramati He. therefore, denied the claim of deceased Taramati for restitution of conjugal rights. The Court of the third Additional District Judge. Akola who had the jurisdiction to try this case under the Hindu Marriage Act framed the following issues;

Issue No.1 : Whether the petitioner is a legally and validity married wife of the respondent and whether the marriage was or was not solemnised on 30-01-1955?

Finding : Yes, yes, it was.

Additional Issue 2 : Should the petitioner be granted a decree for restitution of conjugal rights?

F. Yes.

In that case also evidence was adduced on behalf of either party and on the basis of the evidence adduced in that case which more or less consisted of the same witnesses who have been

examined in the present case, the learned Judge came to the conclusion that there was abundant and clear evidence to prove that the marriage between the petitioner Tara-mati and the respondent was duly performed on 30th January 1955. He observed that the version put forth on behalf of the respondent that there was no marriage and there were only proposals regarding the marriage in September 1955 was improbable and was also not consistent with the probabilities of the case. He therefore, gave a finding that Taramati and the respondent Manohar were legally married on 30th of January 1955 and as a consequence of that finding, decreed the claim of Taramati for restitution of conjugal rights.

7. The learned Civil Judge, Senior Division, Akola, who tried the present suit, relying upon the decision of the Rangoon High Court in *Ma Po Khin v. Ma Shin*¹, which is also reported as AIR 1933 Rangoon 250, observed that a suit for restitution of conjugal rights

¹(ILR 11 Rang 198)

between Taramati and Manohar was purely a private suit between two private persons and no-one else had any right to intervene in the matter and a judgment in such a suit could not be treated as the judgment in rem. The second ground given by the learned Judge was that the decree of the trial Court being one of personal nature there was nothing left for the defendant to take advantage of it and that no attempt was made by the plaintiff either to be brought on record or to set aside the dismissal of the appeal. The third ground was that the defendant had filed an appeal against the decree for restitution of conjugal rights and when such an appeal was filed the decision of the trial Court lost its character of finality and the matter at issue became a matter under judicial enquiry and since the matter was not decided by the High Court on merits and no final decision could be had, no advantage could be derived by the plaintiff from the decree of the trial Court in the suit for restitution of conjugal rights. The trial Judge also relied on a decision of the Patna High Court in *Ramswarup v. Ramesh-war*², holding that on the death of Taramati the right of appeal did not survive and therefore, the appeal abated.

8. It is contended here by the learned counsel for the appellant that the findings given by the lower Court are erroneous and contrary to law. It is urged that the former suit between Taramati and the respondent Manohar was a suit tried by the Third Additional District Judge Akola in his matrimonial jurisdiction and was one under Section 9 (1) of the Hindu Marriage Act. In that suit, the question regarding the status of Taramati vis-a-vis the respondent Manohar was directly in issue, namely, whether she was legally married to the respondent Manohar and the judgment given in that case is a judgment in rem, which is binding not only on the parties to the suit but against the whole world under Section 41 of the Evidence Act and that judgment having become final it will bind the present respondent in the present suit also and it is no longer open for the respondent to challenge the factum or the validity of the marriage between him and the deceased Taramati. It is further contended on behalf of the appellant that though the appeal has abated on account of the death of the respondent-Taramati therein and the cause of action did not survive, still the judgment passed in Civil Suit No.32-A of 1957 becomes final and binding for all purposes and the respondent Manohar could not go behind the said judgment and decree.

9. Section 41 of the Evidence Act deals with judgments, orders or decrees of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction. It reads as :

"S.41 : A final judgment order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any thing is relevant.

Such judgment, order or decree is conclusive proof * * * * * that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment order or decree declares it to have accrued to that person : That any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease, and that anything to which it declares any person to be so entitled was the property of that person at the time

²(ILR 28 Pat 989)

from which such judgment, order or decree declares that it had been or should be his property." It will thus be seen that a judgment, order or decree of a competent Court in the exercise of matrimonial jurisdiction is of a conclusive nature and confers upon a person a right in rem which is not only binding on the parties to the suit, but binding as against the whole world. Prior to the enactment of the Hindu Marriage Act, 1955 so far as the Hindus were concerned, there was no matrimonial jurisdiction to decide the questions regarding the matters connected with marriage, such as restitution of conjugal rights, judicial separation, divorce, nullity of marriage, declaration of a marriage as void etc. By enacting the Hindu Marriage Act 1955, Act No.25 of 1955, a special jurisdiction has now been conferred with respect to the Hindu inhabitants in relation to marital matters and now the District Court is constituted a Special Court for determining the questions arising under the Hindu Marriage Act. All these questions now arising under the Hindu Marriage Act would be questions within the matrimonial jurisdiction and are no longer triable by the ordinary Civil Courts as was done previously under Section 9 of the Code of Civil Procedure . Previously suits for restitution of conjugal rights could be entertained by the ordinary Civil Courts under their general powers under Section 9 of the Code of Civil Procedure and they had jurisdiction to decide the questions regarding the status of the parties and they could give or refuse declarations in that respect and give the necessary reliefs. But after passing of the Hindu Marriage Act, 1955, the jurisdiction has been exclusively given to the District Courts which have now to try the matters falling under the Hindu Marriage Act. Sarkar in his Evidence Act Eleventh Edition, at page 466 states that a judgment of a Court under the Hindu Marriage Act, 1955 is one in the exercise of matrimonial jurisdiction and falls under Section 41 and would be conclusive against the whole world. This proposition has been laid down in a decision reported in *Siddaiah v. Penchalamma*³, in which it is said that a judgment by a Subordinate Judge or District Judge in the exercise of the jurisdiction conferred upon him by the Hindu Marriage Act would fall within

the purview of Section 41 of the Evidence Act and the decision given in the exercise of matrimonial jurisdiction would be conclusive not only against the parties to the proceeding, but against the whole world. In other words, such judgments would operate as judgments in rem. We respectfully concur with this view expressed by the Division Bench of the Andhra Pradesh High Court.

10. The next question that arises is as to the effect of the death of Taramati during the pendency of the first appeal against the judgment and decree in that former suit for restitution of conjugal rights. It is contended on behalf of the respondent that the provisions of Order 22 of the Code of Civil Procedure do not apply to proceedings under the Hindu Marriage Act and as such, there cannot be an abatement of an appeal in the High Court on the death of a respondent even though the cause of action does not survive. In that appeal, being First Appeal No.6 of 1958, the present respondent was the appellant and ordinarily it is the appellant's duty to bring on record the legal representatives of a deceased respondent within the prescribed period of time and if he fails to do that the appeal automatically abates. This would be so where the right to sue or to prosecute the appeal survives. If however, the right to sue or prosecute the appeal does not survive because of the death of the respondent then the appeal abates and the appeal cannot proceed further. The provisions of Order 22 apply to suits as well as to appeals and if the right to continue the appeal does not survive in the case, the appeal must be held to be abated. It is, therefore, contended on behalf of the respondent that the provisions of Order

³ AIR 1963 And Pra 158

22 of the Code of Civil Procedure not being applicable to these proceedings, no question of abatement arises and, therefore, the decision in Civil Suit No.32-A of 1957 loses its finality. It is further contended that if the appeal abates, the suit also abates and there is no decision even of the first Court in existence and as such, the decision of the first Court in Civil Suit No.32-A of 1957 becomes ineffective altogether. We cannot accept the contentions on behalf of the respondent for more reasons than one. In the first place, it is not correct to say that the provisions of Order 22 of the Code of Civil Procedure will not be applicable to the present proceedings. In fact, Section 21 of the Hindu Marriage Act with which we are dealing itself makes provisions of the Code of Civil Procedure applicable to these proceedings. Section 21 is in these words :

"S.21. Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated as far as may be, by the Code of Civil Procedure, 1908."

There are no other provisions in the Hindu Marriage Act limiting the application of Order 22 of the Code of Civil Procedure, nor any rules of this Court and, therefore, the provisions of the Code of Civil Procedure must apply in dealing with the petitions under the Hindu Marriage Act. In the absence of anything, therefore, whenever a party to a suit or proceeding under any of the provisions of the Hindu Marriage Act dies the steps which are required to be taken under Order

22 of the Code of Civil Procedure in an ordinary suit must also be taken in these suits or proceedings and if such steps are not taken, then the suit or proceeding will be visited with the same consequences which any other suit would be visited with. If, therefore, the right to continue the appeal does not survive, the sole respondent having died, then the appeal as a natural consequence must abate and has to be dismissed and no fresh suit could be brought on the same cause of action. The effect of this abatement would be that the judgment which was given by the Court below between the parties becomes final and conclusive as between the parties thereto or their representatives in interest. Accepting the contention on behalf of the respondent that the provisions of Order 22 being inapplicable to such proceedings there is no provision for the abatement of the appeal, we do not see how the matter can be taken any further. If there is no provision for abatement of the appeal, there is no provision for the abatement of the suit as well and the decree passed in this suit is not automatically wiped off. Apart from that, if it is taken that the appeal continues to be pending there being no abatement, as contended on behalf of the respondent, then the position is still worse because the present respondent was the appellant in First Appeal No.6 of 1958 and he himself stated before this Court that he did not want to proceed with the appeal since the respondent Taramati had died. This would, therefore, amount to a dismissal of the appeal for non-prosecution and in that event also the decision of the first Court would remain final and conclusive and would be binding in all subsequent proceedings. Looked at from any point of view, the finality attaches to the judgment in Civil Suit No.32-A of 1957.

11. The question regarding the effect of the death of a party has been considered at length in a decision by the Andhra Pradesh High Court in *Sunanda v. Venkata Subbarao*⁴. In this case Chief Justice Subba, Rao (who later on was Chief Justice of India) dealt with the matter very elaborately. He was dealing with a case under the Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949). That was a case regarding the dissolution of a

⁴ AIR 1957 And Pra424

marriage and it was held that a decree of a Court of competent jurisdiction in such matters determines the status of the parties thereto and was equivalent to a judgment in rem. Similar would be the case where restitution of conjugal rights is claimed in a matrimonial jurisdiction and as we have already shown, such a judgment is a judgment in rem. In the case with which Chief Justice Subba Rao was dealing, there also the decree was passed and in an appeal against the said decree, the respondent died and question was what was the effect of the death of the respondent in an appeal filed against that decree. After taking stock of several decisions, the learned Judges held that if it was a judgment in rem and unless and until a Court of appeal reversed it the marriage was for all purposes at an end. They further laid down that when an appeal abates the decree is not automatically vacated and it continues to have legal force till it is in an appropriate manner reversed or modified. An argument was advanced in that case that an appeal is a continuation of a suit and, therefore, the decree is automatically vacated. This argument, however, was not countenanced by the learned Judges and they held that in case the right to sue does not survive or even if it survives, the legal representatives are not brought on record under that order the appeal alone abates but not the suit. We are in respectful agreement

with the decision of the Andhra Pradesh High Court on this question, which arose in circumstances similar to the present ones. Here also we have a judgment in rem which decided the status of deceased Taramati vis-a-vis the respondent Manohar. It was held there that the deceased Taramati was the legally married wife of Manohar. That decision was based on the evidence produced in that case. That decision binds not only the present respondent Manohar, but was binding against the whole world. The abatement of the appeal on account of the death of Taramati did not make any difference whatsoever to the finality of the decision in Civil Suit No.32-A of 1957. That decision, therefore, continued to be binding on the respondent Manohar.

12. The decision of the Rangoon High Court in ILR 11 Rang 198 : AIR 1933 Rangoon 250 and the decision of this Court in *Muncherji Cursetji Khambata v. Jessie*⁵, have no application in the circumstances of the present case. The question in the Rangoon case was whether a judgment in a suit for restitution of conjugal rights operated as a judgment in rem. That judgment was sought to be made use of in a subsequent suit and it was urged that that judgment was a judgment in rem under Section 41 of the Evidence Act. There was no suggestion that the Court which gave the first judgment in the suit for restitution of conjugal rights was a competent Court acting in the exercise of matrimonial jurisdiction. In those circumstances it was held that Section 41 had no application to the case and that judgment could not be said to be a judgment in rem. Similar was the case with respect to the Bombay decision. In contrast to them, we have here a judgment of a competent Court exercising the jurisdiction in matrimonial matters wherein the status of Taramati was in issue and has been decided. That judgment no doubt would be a judgment in rem under the provisions of Section 41 of the Evidence Act. We are, therefore, of the opinion that the judgment in Civil Suit No.32-A of 1957 which decides the question regarding the status of Taramati as wife of Manohar is binding and conclusive for all times and in the instant suit also that judgment could have been taken as a conclusive piece of evidence to hold that Taramati was the legally married wife of Manohar, Manohar was a party to that suit and he is a party to this suit also. Besides, Suhas who claims to be the legitimate son of Manohar is the son of Taramati and as such, he could be said to be representative in interest of Taramati, though strictly that is also not

⁵ AIR 1935 Bom 5

necessary since the judgment binds the whole world.

13. As regards the question whether the appellant-plaintiff was the son begotten during the lawful wedlock of Taramati and the respondent the learned trial Judge has given a finding that if the marriage of the defendant with Taramati were proved to be on 30th January 1955, the plaintiff who was born to Taramati on 30th October 1955 could have been held to be a legitimate child of the defendant and Taramati. In the earlier suit also Taramati had filed proceedings under Section 26 of the Hindu Marriage Act claiming maintenance for the present appellant, but those proceedings were also dismissed for want of prosecution on the death of Taramati. If the marriage between Taramati and the defendant is held proved on the basis of the decision in Civil

Suit No.32-A of 1957, then the plaintiff would be the legitimate son of Taramati and the defendant during the lawful wedlock and would also get the status of the legitimate son of the defendant.

14. These preliminary questions were first argued by the learned counsel for the appellant and seeing a great deal of substance in the arguments advanced on behalf of the appellant, we called upon the respondent to advance arguments on these points only before entering into the discussion of the evidence on the factum of the marriage. On hearing the arguments advanced on behalf of both sides, we feel that the findings given by the learned Judge of the lower Court on the preliminary issues are erroneous and illegal and need to be set aside and on the basis of the previous decision in proceedings under Section 9 of the Hindu Marriage Act it has to be held that Taramati was the legally married wife of the respondent Manohar and their marriage was solemnized on 30th of January, 1955. On this finding being reached, we do not consider it necessary to go into the evidence in the case for the purposes of finding out the fact of marriage between Tarabai and the respondent on the evidence adduced in this case. We have left this question of reaching a finding on the basis of the evidence in this case undecided. In the view we have taken, the judgment and decree of the lower Court dismissing the suit of the plaintiff are liable to be set aside.

Order accordingly.