

RAJASTHAN HIGH COURT

Sunita

Vs.

Puneet Ram Chandani

C.M.W.P. No. 993 of 2005

(Prakash Tatia, J.)

05.04.2005

ORDER

Prakash Tatia, J.

1. Heard learned counsel for the parties.
2. Brief facts of the case are that one Smt. Jasoda Devi and her son Puneet filed suit for declaring the marriage between said Puneet with respondent Sunita as void. It is alleged by the plaintiffs-non-petitioners in the plaint that the plaintiff No. 2 and defendant Sunita are descendants of Ghyanchand in third decree only. In view of the above, both are sapindas and their marriage is void. Apart from above ground, there are number of grounds for declaring the alleged marriage of Puneet with Sunita as void. In this petition under Section 11 of the Hindu Marriage Act, the petitioner has submitted application under Section 24 of the Hindu Marriage Act claiming the interim maintenance and litigation expenses. This application was contested by the plaintiff-non- petitioners by filing the reply. The trial Court vide order dated 27-1-2005, held that *prima facie* the marriage between said Puneet with Sunita appears to be void in view of the fact that the applicant-petitioner did not deny the relations as disclosed by the plaintiffs.
3. The petitioner is aggrieved against the order dated 27-1-2005 by which the petitioner's application under Section 24 of the Hindu Marriage Act was dismissed by the trial Court. So far as relations because of the fact that both are descendants of one Ghyanchand are not in dispute. The plaintiffs submitted that the marriage is void because of both are falling in the prohibited degree and plaintiff's further submitted

that in fact, the plaintiff No. 2 Puneet never contracted marriage with the petitioner-defendant. The contention of the petitioner is that marriage took place and therefore, only the plaintiffs-non-petitioners filed the suit for declaring the marriage as void and if there was no marriage, they could have sought the declaration that it may be declared that defendant is not plaintiffs wife as suit for declaration of status is also maintainable.

4. It is also submitted by learned counsel for the petitioner that the custom permits the marriage between the relations and, therefore, the petitioner's marriage with the non-petitioner Puneet is a legal marriage. It is also submitted that the allegations leveled against the petitioner should not have been accepted and she should not have been denied the interim maintenance under Section 24 of the Hindu Marriage Act nor she can be denied the litigation expenses. It is also submitted that petitioner since has no source of income, therefore, she cannot contest the suit without there being any award of the litigation expenses to the petitioner from the husband. It is also submitted that till the marriage is declared void, it cannot be said that marriage is void and, therefore, the Court should have proceeded by assuming that petitioner and the respondent Puneet are wife and husband and maintenance should have been awarded to the petitioner.

5. I considered the submissions of learned counsel for the petitioner.

6. It is true that as far as possible, liberal view is required to be taken in such type of cases where the maintenance is claimed by the wife from the husband on the ground that she has no other source of income and the maintenance is required for her livelihood. It is also true that the lady is required to be given full support so that she may contest the matrimonial petition. It is also true that unless and until the marriage is dissolved by the decree of the Court or is declared void on being finding it as voidable or void, the marriage is presumed to be subsisted between the alleged contracting parties. But when fact prohibited relationship is not in dispute then the burden may shift upon the party claiming benefit of exemption. The relationship of petitioner and the plaintiff Puneet are not in dispute as both are descendants of one common ancestral Ghyanchand.

7. The Section 11 provides that the marriages in contravention of the conditions specified in clauses (iv), (v) and (v) of Section 5, shall be void. The voidable marriages are enumerated in Section 12 of the Hindu Marriage Act. As per clause (iv),

the marriages between the persons with the degrees of prohibited relationship are not permissible and if said sub-clause is read with Section 11 then such marriage is void. At the same time, sub-clause (iv) provides that the prohibition is not applicable if the custom or usage, governing each of the contracting party, permits to marry. Therefore, in view of the above admitted aspect of the matter the petitioner and Puneet are within the degrees of prohibited relationship. Therefore, onus shifts upon the petitioner to prove that their marriage is saved by the custom or usage.

8. It will be relevant to mention here that at the time when the impugned order was passed by the trial Court, the written statement was not filed by the defendant-petitioner and, therefore, the defense, which is sought to be taken to save the marriage, has not come on record. The defendant-petitioner, therefore, should first file written statement and may place on record sufficient material to substantiate her plea, which is necessary because of the fact of admitted relationship of prohibited degree between the petitioner and the non-petitioner Puneet. Without there being any defense and material available on record the trial Court was not in position to draw any inference about the legality of the marriage and, therefore, if the trial Court has observed that prima facie, the marriage appears to be void, the trial Court only observed on the basis of material available on record.

9. In peculiar facts of the case if petitioner wants to take benefit then she should first place on record certain material to convince the Court that the marriage is not void. If there is sufficient material available on record to demonstrate that the marriage is void then she cannot get any maintenance under Section 24 of the Hindu Marriage Act.

10. It may be mentioned here that every allegation of marriage is void, cannot be accepted in each and every case, but here in this case, there is a sharp distinction because of the reason that unless the custom is proved then marriage is void is an admitted case in view of what has been submitted even before this Court.

11. In view of the above, it will be appropriate for this Court to set aside the order dated 27-1-2005 so that the application filed by the petitioner may be considered after filing the reply to the petition under Section 11 of the Hindu Marriage Act and both the parties be permitted to place on record the evidence, which they want to rely upon to satisfy the Court about the validity (prima facie) of marriage between the parties.

12. In view of the above, the writ petition of the petitioner is allowed and the impugned order dated 27-1-2005 is set aside. The application under Section 11 of the Hindu Marriage Act may be decided by the trial Court after reply of the petitioner and after hearing both the parties and after considering all the material placed by both the parties.

Petition allowed.