

(2014) 11 BOM CK 0111

In the Bombay High Court

Case No : Family Court Appeal Nos. 21 and 22 of 2011

Dheeraj

APPELLANT

Vs

Kavita
 Kavita Vs Dheeraj

RESPONDENT

Date of Decision : 24-11-2014

Acts Referred:

Hindu Marriage Act, 1955 — Section 11, 12, 13, 13(B), 23
Penal Code, 1860 (IPC) — Section 11, 12, 23, 494, 5

Citation : (2015) 5 ALLMR 133 : (2016) 1 BomCR 626 : (2015) 4 MhLj 301

Hon'ble Judges : B.P. Dharmadhikari, J;A.M. Badar, J

Bench : Division Bench

Advocate : Pramod Patni, Advocate for the Appellant; Rajendra Deshmukh, Advocate for the Respondent

Judgement

B.P. Dharmadhikari, J.—Judgment delivered on 15th June, 2011 by the Judge, Family Court, Aurangabad in Petition No.B-1/2010 is questioned by the husband in Appeal No.21/2011 and by wife in Appeal No.22/11. Proceedings before the Family Court, Aurangabad were presented on 15th March, 2010 by husband Dheeraj against wife Kavita U/Section 11 of the Hindu Marriage Act, 1955 [In short, "the Act".] for declaring marriage between them performed on 20th December, 2009 as null and void.

2. Considering the nature of controversy, it appears, the earlier this Court has made efforts to dispose of these Appeals finally however, the Judgment could not be delivered.

3. We have heard Mr. Pramod Patni, learned counsel for Dheeraj husband and Mr. Rajendra Deshmukh, learned counsel for Kavita wife, in both the matters.

4. Basic facts are not in dispute. Family Court, Aurangabad framed following issues and answered the same as mentioned below

5. A fact that, Kavita was already married with Rajesh Naik [Rathod] on 22nd February, 1994 as per Hindu rites at Aurangabad, is not in dispute. The marriage

between Kavita and Rajesh Naik [Rathod] came to be dissolved on 21st August, 2010 by decree of divorce by mutual consent U/Section 13(B) of "the Act". Thus, marriage between Dheeraj and Kavita took place prior to said dissolution.

6. Though the Family Court recorded finding of the fact that Kavita was having spouse living at the time of her marriage with Dheeraj on 20th December, 2009, it recorded the findings that said fact was not suppressed by Kavita from Dheeraj and it further found that because of knowledge of that fact, husband Dheeraj could not have taken advantage of said marriage and the Family Court used Section 23 of "the Act" against Dheeraj. It found that said Section confers discretion upon it either to grant or refuse relief however, such discretion needs to be exercised judiciously. It's finding show that marriage between Kavita and Rajesh was within the knowledge of Dheeraj since 4 to 5 years before his marriage with Kavita and that he had sexual relations with Kavita, during the said period and, therefore, he could not be permitted to take benefit of his own legal wrong for ousting Respondent Kavita as his wife. It found that, grant of declaration U/Section 11 of "the Act" by itself would amount to furthering "use and throw theory".

7. The Judge, Family Court, Aurangabad recorded finding against Kavita on Issue No.3. It held that she could not prove that Dheeraj fabricated affidavit-cum-bond by obtaining her signature on blank paper. Said finding is questioned by Kavita in her Appeal No.22/11.

8. Mr. Pramod Patni, learned counsel for Dheeraj husband has submitted that provisions of Section 23 of "the Act" does not supersede the provisions of Section 5(i) of "the Act" and if view of the Family Court is accepted, marriage which is void since its inception may cast legal obligation upon the parties thereto. He contended that, the provisions of Sections 5 and 23 of "the Act" need harmonious understanding and approach of the Family Court is, therefore, erroneous. According to him, Sec. 11 of "the Act" declares such marriage void and obtaining a declaration from Court of law in that regard is not necessary. He supported his contention by placing reliance upon following authoritative pronouncements :-

Yamunabai Anantrao Adhav Vs. Anantrao Shivram Adhav and Another, .

A. Subash Babu Vs. State of A.P. and Another, .

Deoki Panjhiyara Vs. Shashi Bhushan Narayan Azad and Another, .

Bajirao Raghoba Tambre Vs. Tolanbai (Miss) and Another, .

Prabhakar Kothale Vs. Shantabai Kothale, .

Vatsala w/o Naranjan Gulwade V/s. Niranjan Ramchandra Gulwade, reported in 1981 Mh.L.J., 917.

Mangala Bhivaji Lad Vs. Dhondiba Rambhau Aher, .

9. Mr. Rajendra Deshmukh, learned counsel for the Ori. Respondent wife submits that the appellant husband was aware of the marriage between Kavita and Rajesh and fact that she was having son namely Tejas from Rajesh and pending litigation between Rajesh and Kavita. With the knowledge of all these facts, he kept relations with her and thereafter also married with her. He was knowing her since the year 2003 and photographs were taken together in the year 2004. Husband in his cross-examination accepted that, Tejas used to accompany Kavita when Kavita came to his shop. His educational qualification is M.A. B.Ed, M.B.A. In this situation, according to Mr. Rajendra Deshmukh, learned counsel, language of Section 23 is very clear and as such if the discretion conferred upon the court under Section 11 of "the Act" is exercised in favour of the husband, it would be allowing him to take benefit of his own wrong. He submits that, use of Section 23 against the husband by the Family Court in this background, is in accordance with the law. He further contends that the affidavit-cum-bond on which signature of Respondent was obtained, therefore, could not have been used against her and her stand that it is fabricated document ought to have been accepted.

10. In the light of these argument, only point arising for determination in this Appeal is :--

"Whether in view of provisions of Section 23 of the Hindu Marriage Act,1955, the Judge, Family Court could have, here, refused to grant declaration of marriage being void under Section 11 of "the Act" thereof.?"

11. Before proceeding to this question, the contention that affidavit-cum-bond obtained by Dheeraj from Kavita is fabricated document needs to be looked into. It is not in dispute that the document was alleged to be fabricated, as Kavita took a plea that Dheeraj forcibly obtained her signature on affidavit by deceiving her. This is considered by the Family Court in paragraph No.18 of its Judgment. Evidence on record show that Advocate Vijay Murlidhar Mache, Notary before whom that affidavit was sworn came to be examined as PW No.2 by Dheeraj. Said Notary deposed that affidavit Exh.No.41 was brought to him by Kavita herself. She admitted contents of that affidavit and accordingly he verified it and obtained her signature upon it. He also took entry of that affidavit in his Notary Register, as per procedure. This evidence of Notary has not been questioned. The Family Court has found that said Notary is independent witness and had no reason to depose falsely. This reasoning of the Family Court cannot be said to be erroneous or perverse. Burden was upon Kavita to plead and prove the circumstances in which Dheeraj forced her to sign on affidavit or then deceived her in signing the same or blank paper. The said burden is not discharged by Kavita at all. Exh.No. 41 is a document dated 18th January, 2009 and her marriage with Dheeraj taken place on 20th December, 2009. In this situation, no exception can be taken to findings recorded by the trial court in this connection.

12. In so far as Section 23 of "the Act" or its impact on Section 11 read with Section 5(i) of "the Act" is concerned, it would be appropriate first to reproduce these provisions. Section 23 of "the Act" reads as under :-

Decree in proceedings.

In any proceeding under this Act, whether defended or not, if the court is satisfied that,

(a) any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause

(b) or sub-clause (c) of clause (ii) of Section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in clause (i) of sub-Section (1) of Section 13, the petitioner has not in any manner been accessory to or connived at or condoned "the Act" or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and

(c) the petition not being a petition presented under section 11 is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

13. Thus, this Section only in one of its sub clauses makes reference to Section 11 and those laid down that if marriage is void under Section 11, the fact that proceedings under "the Act" were being prosecuted in collusion, shall not be bar to grant of decree as prayed for. Section 11 of "the Act" reads as under :-

Void marriages. Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.

14. As already noted above, the law itself declares marriage to be void and can be declared to be if Petition is presented by either party thereto against the other party. Violation of Section 5(i) of "the Act" is covered under Section 11 of "the Act". It is to be noted that Section 5 of "the Act" contains other sub clauses also. However, violation of all sub clauses has not been recognized under Section 11 of "the Act". Sec. 5 reads as under :

Conditions for a Hindu marriage. A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely :-

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity.

(iii) the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degree of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(iv) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

15. Thus, in view of S. 11, violation of sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of Section 5 does not render the marriage void. Only these subclauses in S. 5 find mention in opening part of S. 23 of the Act. Similarly a defence that proceeding under S. 11 is presented or is being prosecuted in collusion with the respondent, is not enough to deny relief to petitioner by taking recourse to S. 23 of the Act due to its clause (c). Thus the conjoint reading of above provisions, therefore, shows that when marriage is void under Section 11, decree or declaration under Section 11 cannot be refused by taking recourse to Section 23 of "the Act". A marriage void in law can not be legalized by reading S. 23 in mode & manner as done by the Family Court.

16. Section 23 envisages marriages which are voidable and, therefore, speak of those breaches or violation which can be waived legally by parties. Interpreting Section 23 in any other way would defeat the legislative mandate under Section 11 and mean that marriage declared void by law will not be presumed to be so by the courts of law. If interpretation as suggested by Mr. Rajendra Deshmukh, learned counsel appearing for Ori. Respondent wife, is accepted, Section 11 itself will be obliterated from the statute book. Following judgments of Hon. Apex Court clear the position of law for present purposes.

In *Yamunabai Anantrao Adhav Vs. Anantrao Shivram Adhav and Another*, , Hon.ble Apex Court has in Paragraph No. 3 observed :--

" Clause (1)(i) of Section 5 lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. It was urged on behalf of the appellant that such a marriage should not be treated as void because such a marriage was earlier recognized in law and custom. A reference was made to Sec. 12 of the Act and it was said that in any event the marriage would be voidable. There is no merit in this contention. By

reason of the overriding effect of the Act as mentioned in Section 4, no aid can be taken of the earlier Hindu law or any custom or usage as a part of that law inconsistent with any provision of the Act. So far as Sec. 12 is concerned, it is confined to other categories of marriages and is not applicable to one solemnized in violation of Section 5(1)(i) of the Act. Sub-Sec. (2) of Sec. 12 puts further restrictions on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriages covered by Sec. 11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose."

In *A. Subash Babu Vs. State of A.P. and Another*, , following observations are recorded by the Hon"ble Apex Court:-

"24. Though Section 11 of the Hindu Marriage Act provides that any marriage solemnized, if it contravenes the conditions specified in clause (i) of Section 5 of the said Act, shall be null and void, it also provides that such marriage may on a petition presented by either party thereto, be so declared. Though the law specifically does not cast an obligation on either party to seek declaration of nullity of marriage and it may be open to the parties even without recourse to the court to treat the marriage as a nullity, such a course is neither prudent nor intended and a declaration in terms of Section 11 of the Hindu Marriage Act will have to be asked for, for the purpose of precaution and/or record. Therefore, until the declaration contemplated by Section 11 of the Hindu Marriage Act is made by a competent court, the woman with whom second marriage is solemnized continues to be the wife within the meaning of Section 494 IPC and would be entitled to maintain a complaint against her husband."

Law as laid down recently in *Deoki Panjhiyara Vs. Shashi Bhushan Narayan Azad and Another*, also supports the same view.

17. In view of these binding precedents of the Hon. Apex Court, We do not find it essential to dwell upon the other judgments mentioned supra. These judgments show that word "may" in S. 11 is not used as referring to an obligation cast on Court by S. 23 or to any power or discretion with the Court, but it gives liberty or option to the parties to marriage to obtain a formal declaration from the Court on the impact of otherwise apparent legislative mandate on their relationship. Construing that "may" as urged by wife tantamounts to say that a marriage will not be presumed to be void unless declared to be so by the Court & it apparently militates with legislative mandate in opening part of said section 11. Remedy under S. 11 is given to the parties to such marriage & against the other party to it. Hence, persons not parties to said marriage but prejudiced by it will be left without any redress & with no option, but to suffer the consequences of such a

marriage as if it is perfectly legal. It follows that parliament has not employed word "may" in S. 11 to enable the parties to such marriage to reach S. 23 of 1955 Act.

18. The Family Court thus indirectly is attempting to legalize the marriage which is void under Section 11 and, thereby, has defeated the provisions of Section 5(i) of "the Act" as also S. 11. Section 23 needs harmonious construction and cannot be used to defeat legislative intent behind enacting Section 5(i) or 11 of "the Act". Perusal of the Judgment mentioned supra, also show need of such harmonious interpretation. In this situation, point for determination framed supra needs to be answered in favour of the appellant -husband and against the respondent wife.

19. Needless to mention that once it is held that Kavita had a spouse living at the time of her marriage with Dheeraj, the marriage is rendered void in terms of Section 11 of "the Act". It is, therefore, not necessary to consider any other fact or then the defence, as raised by Kavita. Once the marriage is found to be void, on petition filed by Dheeraj, the Family Court ought to have declared it to be so. The defence as raised by Kavita had no relevance in so far as said facet of the controversy is concerned. In this situation, it was not necessary for the Family Court to delve into that aspect. As said defence was not material & had no bearing on the relief to be granted, it was not necessary for the family court to record any finding on defence of Kavita or to frame issue no. 3 as done by it.

20. In this situation, Family Court Appeal No.21 Of 2011 is allowed. Petition No.B-1/2010 on the file of the Family Court, Aurangabad is allowed by setting aside the Judgment 15th June, 2011 delivered therein. Marriage dated 20th December, 2009 between Dheeraj and Kavita is declared void under Section 11 because of the violation of Section 5(i) of the Hindu Marriage Act, 1955. Consequently, Family Court Appeal No.22 Of 2011 is dismissed. No order as to costs.

21. Decree be drawn accordingly.